

REDRESS

Seeking Reparation for Torture Survivors

Accountability and Justice for International Crimes in Sudan

A Guide on the Role of the International Criminal Court

May 2007
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Published by: The Redress Trust
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We are very grateful for the support of the Ford Foundation which has provided financing for the research, writing, printing and dissemination of this Guide.

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[Credit: Talal Afifi, Sudanese Photographer]

I. INTRODUCTION

Sudan is a country rich in humanity. Its people share many cultures shaped by the long history of the land. Yet, the country has also experienced numerous periods of political repression, conflict and violence causing grave injustices and suffering of millions of people.

The current crisis in Darfur is no exception. But this time there is a crucial difference. The United Nations Security Council has decided to take action. In September 2004, it set up an International Commission of Inquiry on Darfur, which found that “serious violations of international human rights and humanitarian law amounting to crimes under international law” have been committed.

The Commission recommended that the International Criminal Court (ICC or the Court) should be tasked with investigating and prosecuting those most responsible for these crimes. The UN Security Council acted upon the findings of the Commission of Inquiry and, in March 2005, referred the Darfur situation to the Prosecutor of the International Criminal Court for possible investigation and prosecution.

People worldwide remain extremely concerned by the crimes and suffering in

Darfur and urged and continue to urge the United Nations and others to respond decisively to stop the abuses of individuals and communities in Darfur. Many see the ICC as the best possible mechanism to bring justice and accountability, and to play a role in ending the conflict.

Many people in Darfur have suffered terrible crimes and, in the absence of domestic remedies, expect the International Criminal Court to deliver justice that is meaningful to them.

The referral to the ICC has raised many hopes and expectations in Darfur and Sudan as a whole; the hope for genuine justice, an end to impunity and for a peaceful Darfur and Sudan. The ICC Prosecutor’s investigation of some of the most serious crimes in Darfur presents a unique opportunity for justice in Sudan. The investigation can also serve as an impetus for the competent judicial authorities in Sudan to take steps nationally to investigate with a view to prosecuting those responsible for the many crimes in Darfur.

It is of critical importance that the work of the ICC in Darfur is successful, for the victims in Darfur and the future in Sudan. But there are a series of challenges which will impact upon the success of the ICC:

- **Security Situation Impedes Investigations in Darfur:** The Prosecutor of the ICC has not carried out investigations in Darfur itself because he says it’s not safe. The lack of direct access to the place where the events occurred means that the Office of the Prosecutor (OTP) must rely on sources of information outside of Darfur and this makes investigations more difficult.

- **Justice will take time:** International prosecutions take time. The ICC Prosecutor needs to conduct detailed investigations and this is made more

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complicated by the challenging security environment in Darfur. There are then a number of stages to the process, each with its rules and procedures which must fully respect the rights of the defence and other parties to proceedings, including victims.

- **The ICC will only investigate and prosecute a small number of accused persons:** The ICC Prosecutor does not replace national prosecutors or take over the Sudanese justice system. There is therefore still a very important role for the local justice system.

- **The ICC does not have a police force or army.** As such, it must rely on **cooperation with States** (including the Government of Sudan) and **intergovernmental institutions** (such as the United Nations and the African Union) to assist it with certain aspects of its mandate, including the arrest and transfer to The Hague of persons indicted by the Court, and the protection of victims and witnesses and Court staff.

- **Insufficient Outreach to Victims:** Many victims wonder what the ICC is doing and what it can do for them. The lack of presence on the ground in Darfur and the absence of information about the Prosecutor's investigations mean that victims and others assisting them have little understanding of the process and what they can expect.

- **Lack of Accessible and Objective Information about the ICC:** The ICC is being portrayed by some of its detractors as a tool of foreign intervention. The ICC itself has not considered itself to be able to talk openly about its role in Sudan. In the Sudanese media, the discussion about the ICC can be highly politicised, and the perspective from the ICC as an institution is generally missing. This means that it is not easy to obtain clear and unbiased information about the ICC and its work in Darfur. As a result, many people do not

really know what the Court is about, and there are frustrated expectations, feelings of distrust or even opposition to the ICC.

- **The ICC will not solve all of the material and moral needs of victims for compensation and rehabilitation:** The ICC has an important mandate to receive claims from victims for reparation, including restitution, compensation and rehabilitation. However, the resources available to the Court will not necessarily be adequate given the large numbers of victims and the extreme nature of their suffering.

REDRESS has spoken to numerous victims, lawyers, human rights defenders and others about their knowledge of the ICC and their need for additional information. It has become clear that there are a lot of misunderstandings and unanswered questions about the ICC and its role in Sudan.

Victims, lawyers, human rights defenders and the Sudanese public at large want and need objective information. This Guide seeks to respond to this need. It is written for the Sudanese public, and in particular for victims of international crimes, lawyers and human rights defenders. We hope it will also be of use to all others having an interest in learning more about the work and role of the ICC.

This Guide seeks to:

- **Raise awareness** about the nature, mandate and role of the ICC in Sudan
- **Prevent misinformation** about the ICC, that is, what it can and cannot do
- **Provide practical information** on how to be in contact with the ICC (e.g., how to provide information to the Office of the Prosecutor, how to

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participate in the legal proceedings as victim participants etc.)

- **Consider the impact of the ICC investigations on accountability for international crimes in Sudan past, present and future.**

To this end, the Guide provides information about, and an examination of:

- **The nature and work of the ICC;**
- **The Darfur conflict and how the Prosecutor of the ICC came to investigate international crimes there;**
- **The various stages of ICC proceedings and how the process works in relation to Darfur. This includes developments to date and an outlook on future steps in proceedings;**
- **The significance of the ICC for accountability and justice in Sudan.**

The Guide intends to look at all aspects of the ICC's role in Sudan, though it can never purport to be comprehensive.

There is also a leaflet to accompany the Guide. In a more simplified manner, the leaflet is designed to explain to victims and others impacted by the conflict in Darfur what their rights are, what they can expect of the ICC investigations and how they can engage with the ICC and other bodies.

The Guide uses a question and answer style. It includes issues raised by members of the public and by victims and those that assist them. It also covers issues which have arisen during discussions with civil society groups in Sudan.

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[Villagers, young and old, gather around the air strip with their gourds ready to collect from the spilled sacks of grain. (Credit: UN/DPI Photo #187721C)]

II. INTERNATIONAL JUSTICE AND THE INTERNATIONAL CRIMINAL COURT

A. *What is international justice?*

'Justice' is a precept shared by people worldwide. All religions and systems of law recognise that the physical and mental integrity of persons should be protected, that people are to be treated fairly, that wrongs should be redressed and perpetrators of serious crimes should be punished.

Justice is not only an aspiration; it is also recognised as a fundamental requirement under international law and by national constitutions around the world. It is an integral ingredient of functioning democracies and an imperative to put an end to protracted cycles of criminality.

Bringing perpetrators to justice may contribute to the immediate security of victims and help to prevent future crimes; it may also signify to victims, to their immediate communities and to the world at large, that what was done to them was wrong.

Providing additional forms of relief, such as restitution, compensation and rehabilitation, will also help to address victims' immediate and longer term physical and psychological needs, and assist to restore their dignity and re-integration into the society.

Many victims will have been displaced, have lost their homes and livelihoods, and will literally need to start from scratch to rebuild their lives. The trauma and feelings of shame that often comes with being a victim, particularly for crimes of sexual violence, makes the process of moving forward all the more complicated. The harm and sense of victimisation that accompanies such crimes extends beyond individual victims and their families to whole communities.

The movement for international justice developed in response to massive crimes which had hitherto gone unpunished.

The view that States are free to do whatever they like within their own borders has changed radically in recent times. This understanding that there are limits to national sovereignty is underscored by the recognition that individual citizens have rights under international law - rights that exist inherently, and cannot be bargained away or abridged by States. It is also influenced by the recognition that some crimes are so serious that they offend the sensibilities of the international

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community as a whole - the very essence of the crimes is international, because of the gravity and scale.

The international community has a right and even a duty to act when such crimes are at stake.

Following the adoption by the United Nations of the Universal Declaration of Human Rights in 1948, States accepted their obligations to protect, respect and fulfil a range of human rights. This development owes a lot to the pressure by individuals and victims to have their rights recognised and protected.

It is today clear that a State is not allowed to violate the rights of those found within its territory and elsewhere; it is equally clear that other States and the international community as a whole have a duty to intervene to stop such violations.

States have an obligation to respect human rights and to ensure that their laws and their institutions afford adequate protections to individuals.

But government leaders, State officials and others have for a long time escaped individual criminal responsibility. There are many reasons for this:

- In many instances, there have been amnesty laws, shielding these crimes from prosecution.
- Often the perpetrators are supported by the States who should be punishing them, sometimes the perpetrators are even State officials.
- Sometimes the perpetrators flee their countries, and their country of exile has no interest to bring them to justice.

- There are instances when excuses which are not recognised as legitimate defences under international law are applied to prevent prosecutions (e.g., the excuse of superior orders, immunities)

Today, it is recognised that those who commit international crimes should be prosecuted and punished, whether they are Heads of State, officials or any other person. While some perpetrators continue to evade justice, civil society movements are getting stronger, and continue to demand justice.

"Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provision of international law be enforced."

Nuremberg Tribunal judging Nazi war criminals after the Second World War

B. What is the ICC?

The ICC is a permanent international institution with its headquarters in The Hague, the Netherlands.

The ICC is a criminal court with a very precise mandate that gives it the possibility to try individuals accused of certain crimes and if found guilty, to sentence them accordingly. It employs specialised investigators, prosecutors and judges, amongst others, to fulfil its responsibilities.

Its purpose is to make sure that "the most serious crimes of concern to the

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international community as a whole must not go unpunished.” Any individual responsible for crimes such as genocide, crimes against humanity or war crimes should face justice, no matter what his or her official position, even if he or she is a Head of State or high level government or army official. The ICC has a role in ensuring that this happens, with the Prosecutor focusing on those who bear the greatest responsibility.

C. How was the ICC created?

Calls for the establishment of an International Criminal Court began more than a century ago, and in particular, following the Second World War. A first statute was drafted by the International Law Commission of the United Nations in the early 1950s, but it was not until 1989 that the proposal for the establishment of the Court gained real momentum.

In the 1990s the UN Security Council established two ‘ad-hoc’ criminal tribunals to try those responsible for atrocities committed in the former Yugoslavia and the genocide in Rwanda. These tribunals, and others tribunals that have since been established, are important testaments to the International Community’s resolve to see justice for some of the worst crimes. However, the tribunals could only ever provide a patchwork solution, given that each was established after the fact, to address a particular set of crimes in a particular country, which occurred at a specified period in time. In addition, it was impossible for the UN Security Council to set up a specialised tribunal in each country in which serious international crimes occurred, and so there continued to be countries in which impunity prevailed.

“Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of mankind. Recognising that such grave crimes threaten the peace, security and well-being of the world. Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes”

Preamble of the ICC Treaty

What was really needed was a permanent international criminal court (one which operates all the time, a court that is not limited to investigate crimes in any particular country). States, international organisations and civil society groups from around the world repeated their call for a permanent international criminal court.

After much lobbying and years of preparation and negotiation, thousands of delegates attended a conference to finally create this landmark institution. The “Rome Conference” took place from 15 June to 17 July 1998 in Rome, Italy, with 160 countries participating in the negotiations and numerous civil society groups closely monitoring and contributing to these discussions. At the end of the negotiations, 120 nations voted in favour of the adoption of the Rome Statute of the ICC.

On 11 April 2002, the 60th ratification necessary to trigger the entry into force of the Rome Statute was deposited by several States in conjunction. The treaty entered into force on 1 July 2002.

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To date, the ICC Statute has been ratified by 104 States coming from all regions of the world and reflecting all legal traditions and faiths.



Members of the CICC including The Women's Caucus for Gender Justice welcomed the ICC's entry into force in April 2002. [Credit: CICC]

D. What is special about the ICC?

The ICC is the First Permanent International Criminal Court

The ICC is not a response to a special situation in one country, as were, for example, the 'ad hoc' tribunals for the former Yugoslavia and Rwanda, established by the UN Security Council. Instead, the ICC is based on the agreement of a large number of States that wanted to build a lasting institution to deal with international crimes.

The ICC is an International Body

The ICC is an institution set up by a wide number of States. Currently there are over one hundred States Parties from all regions of the world that have agreed to be bound by the ICC statute. Having so many States helps to ensure that the Court truly reflects a diversity of legal traditions and perspectives. The Court does not depend on any single nation or nations. Instead, the Court is overseen by an 'Assembly of States Parties' in which

each of the 104 States Parties is represented with equal say.

The ICC is an Independent Body

Each of the four organs of the Court - the Presidency, the Judicial Divisions, the Office of the Prosecutor and the Registry - are independent. They are not subject to any influence by States or other intergovernmental bodies, though some of the organs, in particular the Office of the Prosecutor and the Registry rely on support from States and other bodies to carry out some of their functions. The Court is funded by the assessed contributions of all States Parties to the ICC Statute.

The ICC cannot apply the Death Penalty

If an accused person is found guilty by the Court, the ICC can issue a sentence up to a maximum punishment of life imprisonment. There is no death penalty before the ICC.

The ICC Has a Strong Mandate to Prosecute Gender Crimes

The ICC Statute recognises rape, sexual slavery, trafficking, enforced prostitution, forced pregnancy, enforced sterilisation and other crimes of sexual violence as amongst the most serious international crimes. It refers specifically to the need to take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims of crime involving sexual or gender violence or violence against children.

The ICC Has Strong Fair Trial Guarantees

The ICC Statute recognises the rights of suspects and accused to due process and a fair trial. It contains a series of guarantees to ensure that defendants' rights are respected in proceedings and to lessen the risk of a miscarriage of justice. The Defence is given a strong role in proceedings.

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The Treaty recognises a strong role for victims of international crimes

The ICC Statute gives victims of international crimes an active role, including the right to participate and to apply for reparations. For the first time in an international tribunal, victims have an independent status besides the Prosecution and Defence. The ICC Statute also recognises that victims of international crimes require extensive support and protection. It sets out a range of measures of protection and support for victims, including physical and psychological protection and support for those involved in ICC proceedings.

E. The Mandate of the ICC Explained

The ICC can only try three specific international crimes (genocide, crimes against humanity or war crimes) and only if the crimes are said to have been committed on or after 1 July 2002 when the ICC Statute came into force.

i. Genocide, crimes against humanity and war crimes

GENOCIDE

The crime of genocide originated in response to the Holocaust during the Second World War. Genocide was first defined in an international treaty in the Genocide Convention of 1948. It has been called 'the crime of crimes' because its goal is to destroy a people. It is a crime that is extremely difficult to prove because the perpetrators must be shown to have specific intent to destroy a protected group, or at least parts of the group.

For the purpose of the Statute, "genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

CRIMES AGAINST HUMANITY

The ICC Statute lists the following acts as crimes against humanity, when committed as part of a systematic or widespread attack:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- (i) Enforced disappearance of persons;
- (j) The crime of apartheid;
- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

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Many women and girls, and in some instances boys, are said to have been sexually assaulted in Darfur. This includes a range of sexual attacks, including inserting sticks, bottles or other foreign objects into sexual organs.

Women in Darfur are said to have been attacked in the villages, when collecting firewood and water from the camps, and have been abducted and held as sex slaves. The UN Commission of Inquiry is said to have examined hundreds of alleged cases of rape.

“the Commission found that Government 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. These acts were conducted on a widespread and systematic basis, and therefore may amount to crimes against humanity.”

WAR CRIMES

War crimes are serious violations of international humanitarian law. The ICC Statute gives the Court competence in particular over war crimes that are committed as part of a plan or policy or as part of a large scale commission of such crimes.

The ICC Statute provides the Court with competence to investigate and prosecute war crimes that apply during *international* and *internal* armed conflicts.

The Statute makes clear that for the Court to have competence, the acts in question must be of a sufficient scale and gravity, e.g., not to situations of internal

disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.

Many attacks in Darfur are said to have been very similar: Aircrafts bombard or armed vehicles attack a village, armed militias belonging to the Janjaweed come and attack the village, killing, raping, burning down houses, looting property and cattle, and forcing surviving villagers to leave; afterwards, they have to stay in camps and are not allowed or not able to return to their destroyed villages.

Rebel groups are also said to have killed and raped civilians.

Whoever commits any of these crimes in the course of armed conflict, in particular during military operations or as part of an armed group, or orders or turns a blind eye to such attacks may be guilty of a war crime and possibly crimes against humanity.

ii. How is Jurisdiction Established? (Territory of State Party, National of State Party, State Referral or UN Security Council Referral)

Even if one of the three crimes is said to have taken place on or after 1 July 2002, the Court will only be in a position to act if the following **further criteria** are met:

- (i) **The crime took place on the territory of a ‘State Party’** - The Court will have jurisdiction over the crime if it is said to have been committed within the territory of a country that has agreed to be bound by the ICC Statute (one of

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the 104 States that has ratified the ICC Statute); OR

- (ii) **The crime is said to have been committed by a person who is a national (citizen) of a 'State Party'** - The Court will have jurisdiction over the crime if it was committed by someone who is a citizen of a country that has agreed to be bound by the ICC Statute (one of the 104 States that has ratified the ICC Statute); OR
- (iii) **The case is referred by the UN Security Council** - The Court will have jurisdiction where the United Nations Security Council decides to refer the case to the ICC, such as what has occurred with the situation in Darfur; OR
- (iv) **A State voluntarily submits to the jurisdiction of the ICC** - The Court will have jurisdiction where a country that is not a 'State Party' to the ICC Statute submits voluntarily to the Statute, or where a 'State Party' specifically requests the ICC to intervene.

iii. Respect for National Justice Systems

The ICC Statute was designed to avoid interferences with national sovereignty. Out of respect for the national criminal justice system, the ICC is only mandated to consider cases that a national system is unable or unwilling genuinely to investigate or prosecute. Consequently, the ICC will only be involved in cases in Sudan where the Sudanese authorities have failed to investigate and prosecute fully.

ARTICLE 17 OF THE ICC STATUTE

(---)

2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:

(a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;

(b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;

(c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

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

iv. Whom can the ICC prosecute?

In respect of Sudan, the ICC can prosecute any natural person that is accused of genocide, crimes against humanity or war crimes committed in Darfur since 1 July 2002.

There is one exception: The ICC cannot prosecute children, who are under 18 years of age at the time of the commission of the offence (even if such children were part of the armed forces or militia groups and actively participated in the crimes).

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A person may be responsible for an international crime if:

- He/she commits the crimes him/herself;
- Orders or induces a crime;
- Aids, abets or assists a crime;
- Criminal conspiracy: works together with others to commit a crime;
- Incites others to commit genocide;
- Attempts a crime; or
- Command/Superior responsibility: fails to prevent crimes committed under his or her guard.

Two forms of criminal liability are important in attributing responsibility against those who, while being most responsible, have not personally committed the crimes: **criminal conspiracy** and **command responsibility**.

Criminal conspiracy: allows the prosecution of those that plan joint crimes and act together. It means that there is a shared plan to commit a crime, such as gang rape or killing and displacing villagers. A member of a militia, army unit or rebel force, is responsible for such a crime where he (and in exceptional cases she) plans or takes part in any joint attacks in furtherance of the common plan. The perpetrator must know that the attacks are part of a common criminal plan.

Command responsibility: allows the prosecution of commanders and superiors, including political leaders. These persons normally do not personally commit the crimes. Instead, they either direct troops or others to do so (which can be difficult to prove) or turn a blind eye to the crimes of their subordinates. Command responsibility means that a commander or superior up to the head of state, be it of all armed forces, an army unit, militia or rebels, cannot hide by simply saying "it wasn't me" or "I didn't know". A commander or superior can be found guilty for the international crimes committed by his troops, such as gang rape or killing and displacing villager, even if he did not order an attack. It is enough that he failed to stop those under his command, including by punishing perpetrators, even though he knew or should have known that they were committing such crimes.

F. What are the Main Features of the ICC?

Is the ICC part of the UN?

No. The ICC is an international organisation based on a treaty that is independent of the United Nations. However, the UN had an important role in the creation of the Court and continues to play an important part. The ICC and the UN have concluded a relationship agreement in which they agree to help each other in their work and to cooperate and coordinate their activities closely. This concerns institutional relations, including the exchange of information, as well as cooperation and judicial assistance.

Is the ICC a human rights court? How does it differ from the African Commission and the African Court on Human and Peoples' Rights?

No. The ICC is a criminal court, not a human rights court. Human rights bodies deal with the responsibility of States for human rights violations and not with the criminal responsibility of individuals (whether they are State officials or civilians). This latter criminal responsibility is the task of the ICC. The ICC has the ability to look into the criminal responsibility of any individual - even when that individual is a head of State or government official. When it does consider the criminal responsibility of these officials, it is considering them as any other individual, and not in their capacity as State officials; it will never consider the responsibility of the State as an institution as this goes beyond its mandate.

Someone who has been tortured by State officials, for example, can take his or her

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case to an international human rights body, claiming to be a victim of a human rights violation. In the case of Sudan, this would be the African Commission on Human and Peoples' Rights, an African intergovernmental institution based in Banjul, The Gambia in West Africa. The recently established African Court on Human and Peoples' Rights may also be able to hear such cases if Sudan accepts its jurisdiction.

The African Commission examines whether a violation has taken place, and where it finds the State responsible, for example for torture, it may request the State to:

- Take measures to prevent further violations;
- Investigate and prosecute the alleged perpetrators; and
- Provide reparation to the victims.

The African Commission has considered several cases where it found that Sudan has been responsible for serious violations, such as torture, and urged Sudan to 'put an end to violations', to 'bring its legislation in conformity with the African Charter' and to 'duly compensate the victims.' However, the African Commission only rules on the responsibility of the State and not on the criminal responsibility of the individual.

In this way, the ICC and the African Commission are complementary.

Which States are party to the ICC?

As of March 2007, 104 States have become parties to the ICC treaty and many more, such as Sudan, have signed but not yet ratified it.

29 African States have become party to the ICC since 1998:

Burkina Faso, Senegal, Ghana, Mali, Lesotho, Botswana, Sierra Leone, Gabon, South Africa, Nigeria, Central African Republic, Benin, Mauritius, Democratic Republic Of Congo, Niger, Uganda, Namibia, Gambia, United Republic Of Tanzania, Malawi, Djibouti, Zambia, Guinea, Congo, Burundi, Liberia, Kenya, The Union Of The Comoros and Chad.

This impressive number shows that most States have voluntarily accepted the jurisdiction of the ICC, recognising its importance as a truly international court.

It is not too late for other States to become party to the ICC Statute. By becoming a party to the ICC, a government sends a strong signal that it is committed to justice and to ending impunity for international crimes. There are also practical advantages. Only States Parties can influence the development of the Court, for example by voting on the budget or even advocating for a change of the ICC Treaty. States Parties can refer to the Prosecutor any situation, requesting it to investigate the situation with a view to prosecution. The Prosecutor has received three referrals from States Parties, from Uganda, the Democratic Republic of Congo (DRC) and the Central African Republic (CAR), each referring situations in their own territories. In addition, only nationals of States parties can become judges at the Court.

A number of States, including Sudan, have not yet become party to the ICC. Some of these States object to the fact that an international court would have the power to investigate and prosecute their nationals. This view ignores the fact that the ICC would only ever have the ability to investigate or prosecute in situations when the competent national State is unable or unwilling genuinely to conduct domestic proceedings.

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Where is the ICC based?

The ICC is based in The Hague in the Netherlands. This includes the court rooms, the offices of its organs and the detention centres. The ICC does not have its own prisons for convicted persons. Persons who are sentenced to a prison term by the ICC will spend their sentence in prisons of States Parties.



ICC Headquarters in The Hague, the Netherlands.
[Credit: ICC-CPI]

The ICC has established small offices in some of the countries in which it is currently investigating, such as in the Democratic Republic of Congo and Uganda. To date, it has no office in Sudan because of security concerns. However, the ICC has a small field office in Abeche in neighbouring Chad that deals with the situation in Darfur, including refugees from Darfur based in Chad. ICC officials have also carried out five missions to Sudan by early 2007.

What is the structure of the Court?

The ICC is based on a Treaty agreed upon and ratified by States. For this reason, there is an Assembly of States Parties.

The **Assembly of States Parties** has a role similar to a parliament. It is responsible for overseeing the management of the Court and for any issues relating to changes to the founding treaty. The Assembly comes together approximately once a year and takes decisions on a range of issues, such as:

- Adoption of the Annual Court Budget;
- Adoption of legal texts;
- Election of key personnel (such as Judges, the Prosecutor and Registrar).

All States that have become members of the treaty have one vote in decisions. Other States that have signed the treaty or attended the Final Act of the Rome Conference may observe proceedings of the Assembly of States Parties.

Who works for the ICC?

Those who work for the Court come from all geographic regions of the world and various legal systems. The Court has an obligation to ensure that women and men work for it without discrimination. Only nationals of States who have joined the Treaty can become judges but nationals of other States may work for other organs of the ICC, such as the Registry or the Office of the Prosecutor.

What are the official languages of the ICC?

The official languages of the Court are Arabic, English, Chinese, French, Russian and Spanish. The languages used in the daily work of the Court, called working languages, are English and French. The Court may adopt Arabic as a working language in the Darfur situation but has not done so to date.

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Letters or other written messages to the Court can be made in any official language. It is best to write in English or French where possible because not everyone at the Court speaks other languages such as Arabic.

Since when does the ICC operate?

The ICC Treaty came into force in July 2002 and the Court began operating in early 2003.

G. The Organs of the ICC

The ICC has four parts, called organs that are responsible for the various functions of the Court.

i. The Presidency

The **Presidency** is responsible for the proper judicial administration of the Court. It is made up of three judges:

- Philippe Kirsch, judge at the Appeals Division, is the President;
- Akua Kuenyehia, Pre-Trial Division, and René Blattmann, Trial Division, are both Vice-Presidents.

The judicial bodies of the ICC are made up of three Divisions and respective Chambers:

- Pre-Trial;
- Trial; and
- Appeals Division.

The three divisions deal with all judicial matters at the various stages of proceedings. The divisions appoint a chamber for a particular case. In

practice, the word chamber is often used to mean both the divisions (all judges assigned to deal with pre-trial, trial or appeals matters) and the chambers (composed of judges assigned to the particular case).

ii. The Pre-Trial Chambers

The **Pre-trial chamber** decides on the issuance of arrest warrants, confirms charges brought against suspects, ensures respect for the rights of the defence and victims during the investigation as well as protection of victims and witnesses.

The three Pre-trial chamber judges involved in the Darfur situation are:

- Judge Akua Kuenyehia (presiding judge of Pre-Trial Chamber I)
- Judge Claude Jorda
- Judge Sylvia Steiner



Judges of the ICC [Credit: ICC-CPI]

iii. The Trial Chambers

The **Trial chamber** is responsible for hearing all of the evidence proffered by the Prosecutor as well as the defence's case and any views and concerns of victims that have been accorded the right to participate in the proceedings. The trial chamber will issue the verdict of

guilty or not guilty and if there is a finding of guilt, determine the appropriate sentence. It has to ensure that the trial is fair and expeditious, that the rights of the accused and victims are observed and that victims and witnesses enjoy full protection during the trial.

On a finding of guilt, the trial chamber may also hear any reparations claims put forward by victims or may decide reparations on its own accord.

iv. The Appeals Chamber

The **Appeals chamber** decides on appeals against decisions made by the pre-trial chamber or the trial chamber, which can be brought by the Prosecutor of the Defence. It takes the final decision, either upholding the decision appealed against, changing it or ordering a retrial.

The appeals chamber can also hear appeals from victims that relate to reparations decisions taken by the trial chamber.

A total of 18 judges from around the world (10 male and 8 female from Bolivia, Bulgaria, Brazil, Canada, Costa Rica, Cyprus, Finland, France, Germany, Ghana, Italy, Ireland, Latvia, Mali, Republic of Korea, South Africa, Trinidad and Tobago and the United Kingdom) serve in these three chambers.

The judges are elected by the Assembly of States Parties and the Treaty makes clear that *“the judges shall be independent in the performance of their functions.”*

v. The Office of the Prosecutor

The **Office of the Prosecutor**, also referred to as the OTP, is an independent

and separate organ of the ICC. The Prosecutor and head of the office is Mr. Luis Moreno-Ocampo from Argentina.

The Office of the Prosecutor is responsible for examining information on crimes and conducting investigations and prosecutions before the Court.

Since 2004, the Office of the Prosecutor has examined a number of situations to decide whether or not to open an investigation. By early 2007, the Prosecutor had opened official investigations of crimes committed in Uganda, the Democratic Republic of Congo, and Darfur, Sudan. **Thomas Lubanga** from the Democratic Republic of Congo is the first person arrested by the International Criminal Court on charges relating to the enlisting and conscription of children under the age of fifteen years into the rebel movement that he is said to be affiliated with. He was transferred to The Hague in March 2006.

In the end of January 2007, the three charges brought by the Prosecutor against Mr. Lubanga were confirmed by the Pre-trial chamber. This means that the Pre-trial chamber decided that there is sufficient evidence to believe that he is responsible for the charges brought by the Prosecutor. The Pre-trial chamber referred the case for trial before a Trial Chamber, and the trial is expected to begin in 2007.

The OTP milestones on Darfur:

- On 1 June 2005, the OTP informed the Pre-Trial Chamber that it had opened an official investigation into the situation in Darfur;
- On 27 February 2007, the OTP requested that the Pre-Trial Chamber issue summonses naming

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Ahmad Muhammad HARUN and Ali Muhammad Ali ABD-AL-RAHMAN (also known as Ali KUSHAYB) and directing them to appear in this Court for initial proceedings relating to crimes against humanity and war crimes committed in Darfur.

vi. The Registry

The **Registry** is the organ of the Court responsible for the general administration and service of the Court. It is headed by Mr. Bruno Cathala from France and deals with administrative matters, legal advice and services such as interpretation and translation, victim and witness protection and support, and all matters relating to detention and court services.

The Registry has a separate division for Victims and Counsel, which includes the Victims Participation and Reparations Section and the Defence Section.

- On 25 August 2006, the Registrar appointed Mr. Hadi Shalluf as ad hoc Counsel for the Defence, to represent and protect the general interests of the Defence in the Situation in Darfur. In March 2007, his mandate came to an end following a decision by the Pre-Trial Chamber I. There is currently no ad hoc Counsel for the Defence.

H. The ICC and National Justice

The potential for the ICC to act as an important catalyst for national justice in Sudan must be underscored. The ICC investigation and prosecution should

serve as an impetus to local justice officials to advance with local investigations and prosecutions.

The ICC Statute, even if not yet ratified by Sudan, may still be used as a benchmark for local investigators and prosecutors in their conduct of local investigations and trials, including:

- **Fair trial guarantees are respected** (including the respect of defence and victims rights);
- **The impartiality of the judiciary is guaranteed** (judges are free from bias and are provided with safety and security and adequate remuneration in order to perform their functions effectively);
- **Victims are protected from reprisals and from suffering further trauma as well as provided with adequate and appropriate support and guidance throughout the process;**
- **Victims are entitled to reparation for the harm that they suffered, including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.** Victims must have effective access to such remedies and there must be systems in place to ensure that any awards are enforceable in practice;
- **Official capacity is irrelevant in respect of accountability for international crimes.** Official capacity, even in respect of a Head of State or senior government official, is not an excuse for the commission of serious crimes under international law; there are no immunities or other rules which can bar a prosecution or civil action;
- **Responsibility of Superiors:** Superiors, such as military commanders, civilian government

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leaders or others who may have care or control of those acting under them, may be held responsible for the actions of their subordinates;

- **Superior Orders:** The fact that a subordinate received an order from a superior to commit a criminal act does not operate as a justifiable excuse for the subordinate who committed the criminal act or remove their criminal responsibility;
- **No statute of limitations** - there should be no time limit for when a case can be brought - there is always a responsibility to investigate crimes as serious as these, no matter how much time has passed since the offences are said to have been committed.

The Government of Sudan remains responsible to respond to these crimes. In particular, the Government should:

- Reform laws as necessary in order to effectively prohibit international crimes in a way which is consistent with Sudan's international obligations

(Even if Sudan has not yet ratified the International Criminal Court Statute, most of the obligations that are set out in the Statute are principles to which Sudan is already bound, either as a matter of treaty or customary international law. For example, it has ratified the four Geneva Conventions of 1949, the International Covenant on Civil and Political Rights and the African Charter on Human and Peoples' Right];

- Do away with immunities which have prevented some national cases from proceeding thus far;
- The Government should also have a policy of prosecuting all serious

crimes, no matter who is said to be responsible; - Victims should also be given greater participatory rights and measures should be put in place to guarantee their safety and security;

- Moreover, opportunities should be provided for victims to obtain adequate and effective compensation and other forms of reparation for their suffering.

It is important therefore, that the Government of Sudan establish the necessary procedures to ensure that crimes as serious as the ones said to have been committed in Darfur can be effectively investigated and prosecuted in accordance with international standards.

This is important irrespective of the ICC investigation, for the crimes of the present and in particular in Darfur, but also for any other serious international crime which occurred in Sudan in the past.

Finally, as a sign of Sudan's commitment to the rule of law and the fight against impunity for international crimes, the Government should ratify the ICC treaty as soon as possible.

What has the Government of Sudan done to strengthen domestic criminal justice?

The Government of Sudan has set up several Special Courts, Commissions, Committees and other bodies to investigate and prosecute crimes in Darfur. However, these bodies and courts have to date not brought meaningful criminal justice. Most observers do not believe that enough has been done to bring those responsible to justice. It is important that any steps taken are not just a limited response to ICC

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investigations in Darfur but tackle shortcomings and problems apparent in the working of the **Sudanese criminal justice system** as a whole.

Such shortcomings and problems are not limited to Darfur. Many factors hinder investigation and prosecution of those responsible for serious crimes. Some of the most important factors include:

- Sudanese criminal laws do not recognise the international crimes of genocide, crimes against humanity and war crimes. This means that perpetrators can only be prosecuted for other crimes that do not necessarily reflect the seriousness of the acts concerned.
- The police and security forces do not have a strong policy of prosecuting those responsible for international crimes within their own ranks.
- Officials enjoy immunity from prosecution. The immunity can be lifted but in most cases it isn't. Even where officials are held responsible for serious crimes, they can often carry on with their job without sanction.
- Victims and witness do not enjoy protection. Many victims do not want to complain and get involved in criminal cases against officials because they rightly fear that they may suffer if they do.
- There is no proper and effective system of documenting violations and collecting evidence. Medical reports can only be used if they comply with 'form 8' that does not allow a full medical assessment, in particular with regard to psychological suffering.
- There are concerns about how independent judges are in practice, in

particular how willing they are to take effective action against officials.

This means that there is a need for change. Changes need to be made in the laws, the institutions and the actual practice. The 2005 Comprehensive Peace Agreement between the Government of Sudan and the SPLA/SPLM recognises this need, as does the 2006 Darfur Peace Agreement to a lesser degree. The adoption of the National Interim Constitution in 2005 was an important step, in particular by recognising international human rights for all Sudanese. Yet, the Government of Sudan has done little so far to make the Peace Agreement a reality.

For real justice to take hold in Sudan, the criminal laws need to be thoroughly reformed. In particular, victims' rights to a prompt, impartial and effective investigation must be guaranteed. Victims need to be given the right to play a more active role in proceedings, and victims and witnesses' protection must be made effective. There is an urgent need to reform police, security and military intelligence and to turn them into a service for the people rather than forces working against them. As a first step, no official should be shielded by immunity laws from criminal or civil proceedings. Prosecutors and judges must also be fully independent in their work.

The Government has taken some first steps to look into law reform and institutional changes. However, more needs to be done more quickly to protect and fulfil the rights owed to the Sudanese and indeed anyone living in Sudan.

What should the Government of Sudan and others do to promote justice and accountability in Sudan?

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Sudan's history is full of conflict, repression and serious crimes. Stopping violence and bringing about a peaceful resolution of conflict is an important foundation for justice and accountability. Indeed, the National Interim Constitution tasks the State to: "initiate a comprehensive process of national reconciliation and healing that shall promote national harmony and peaceful co-existence among all Sudanese." For peace to last, discrimination needs to end and political arrangements must allow for peaceful conflict resolution. People rightly expect justice and accountability not only for future crimes but also for past crimes. Confronting the past may be painful but, if done properly, will allow victims to learn the truth and to obtain justice. It can also lead to more knowledge about injustices and what needs to be done to prevent similar crimes in the future. Many other countries, such as Morocco, Sierra Leone and South Africa, have established commissions or other bodies to deal with past violations and crimes. These commissions usually include members from civil society, including victims' associations, and have the task to:

- Establish a truthful record of the crimes committed, by whom and against whom;
- Make recommendations on what needs to be done to ensure justice for victims and to prevent similar crimes from happening again. This includes reparations and proposals for necessary reforms.

A commission or body could also find out the underlying reasons for violations and propose legal and institutional reforms that should be put into practice as quickly as possible. However, these commissions do not have the power to prosecute. Usually, it is for the State to acknowledge that human rights violations amounting to international crimes have been committed and to do everything

possible to hold the perpetrators accountable. This can be done through ordinary courts or the setting up of tribunals responsible for trying these crimes in an independent and fair manner. The situation in Darfur is a unique opportunity for the Government of Sudan. This is to show people in the whole of Sudan that it is taking the rights of individuals seriously and is not letting perpetrators of serious crimes get away without punishment. The Darfur Dialogue envisaged in the Darfur Peace Agreement, which is meant to deal with a wide range of issues concerning Darfur, can serve as a useful process to deal with questions of how to establish the rule of law and victims' rights as means to ensure peace and reconciliation.

Mechanisms mandated to promote truth, justice and reconciliation for serious crimes should not be limited to the situation in Darfur given that many such crimes have been committed in other parts of Sudan over the last decades. It is therefore important to establish nationwide bodies or mechanisms tasked with revealing the truth and promoting justice, including reparation, for the crimes committed by the State but also armed groups in Sudan since 1989, or even before. Civil society groups have been working for several years on the question of how to establish firmly justice and the rule of law in Sudan. An important landmark is the recommendations made in the Kampala Declaration on Human Rights in Sudan of 1999 adopted by the Conference on Human Rights in the Transition in Sudan.

A related step would be the establishment of an independent and strong national human rights commission as a body to act and stand up in the interest of individual and peoples' rights in Sudan. Any government of Sudan owes it to the many victims of international crimes that their rights are finally recognised and are protected in practice.

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The Government of Sudan should ratify the ICC Statute

The Government of Sudan can and should become party to such important international treaties as the UN Convention against Torture and the Rome Statute of the ICC (which it signed in 2000 but has not ratified yet). While the Government has opposed the ICC on the grounds that it violates national sovereignty, there are a number of good reasons for becoming a State party.

Doing so would send a clear signal that the Government is taking its commitment to international standards seriously and that it is determined to bring to an end impunity for serious crimes and to ensure justice. Moreover, only by becoming a member of the ICC will Sudan be able to influence the development of the ICC. With the growing number of States that join the ICC, those States that do not will become more and more isolated.

The Government of Sudan has objected to a number of features of the ICC treaty, including the lack of immunity for heads of State, the possibility of surrendering its' citizens, the wide powers of the ICC Prosecutor, possible interference by the Security Council and the exclusion of the death penalty as punishment.

Other States have raised similar concerns about the ICC. However, countries that showed strong political will and commitment mastered these hurdles. For example, States have changed their constitutions and laws to remove the immunity of heads of State for ICC prosecutions and to allow the surrender of their nationals. Most States do not share the concerns about possible interferences with their sovereignty. Rather than violating national sovereignty, the ICC treaty reaffirms it. Where a State conducts effective investigations and prosecutions, there will be no need for the ICC Prosecutor to

use its powers and no need for a State to surrender its citizens.

The ICC treaty is a delicate balance between the demands of international justice and respect for national sovereignty. It has some novel features that reflect international views on what criminal and victims' justice should look like. The objections raised by the Government of Sudan do not recognise this compromise, and indeed, if these objections were to be taken seriously, than there could never be a permanent international criminal court.

If Sudan were to become a party to the ICC, on the other hand, it would become a member of the Assembly of States Parties, and could actively take part in the work and development of the ICC. This means in particular having a vote on such issues as adopting legal documents and the budget, as well as electing judges or the prosecutor. Becoming a party to the ICC also means that Sudanese nationals could become judges or prosecutors. Finally, Sudan could request the prosecutor to investigate or prosecute international crimes, either in Sudan or in other States that are party to the ICC.

III. THE ICC AND DARFUR

In Darfur, it is widely acknowledged that many acts which would amount to international crimes, including attacks on villages, massacres, mass rapes and forced displacements, have taken place.

The International Criminal Court is not only important for bringing justice to victims of the most serious crimes in Darfur. It can also send an important signal about the seriousness of the situation- so grave that the International Community is compelled to become involved. In this respect, the involvement of the ICC is an important statement as to the nature of the crimes which are said to have been committed in Darfur.

It is the gravity of the findings of the International Commission of Inquiry on Darfur that led the United Nations Security Council to refer the 'situation' to the Prosecutor of the ICC for investigation.

In March 2005, the UN Security Council decided *"to refer the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court."*

The Prosecutor of the ICC is preparing cases against individuals believed to be responsible for the most serious international crimes committed in Darfur.

A. How did the ICC come to investigate crimes in Darfur?

Since the beginning of the current conflict in Darfur in 2002, and in particular throughout 2003 and 2004, more and more reports about atrocities committed in Darfur and a large number

of refugees from Darfur alerted people worldwide. The African Union decided to send a protection force to Darfur and the UN was seeking a peaceful solution of the conflict. However, the situation became worse and violations continued. The UN Security Council, whose task is to maintain or restore international peace and security, grew very concerned about these developments. In several countries, people were calling for international action to stop what they saw as an ongoing genocide.

A series of measures were taken in 2004. In July of that year, the Government of Sudan allowed the sending of UN human rights monitors to Darfur. Their role was to support ongoing protection efforts and to monitor and act on individual cases. Also in 2004, the African Union sent several thousand soldiers to Darfur to ensure peace and safety. Its mission (AMIS) also has officers to monitor human rights and to protect the population. In early 2005, the UN Security Council established the United Nations Mission in Sudan (UNMIS). As part of its broad mandate to further peace, humanitarian assistance, recovery and development, UNMIS established and maintains a human rights programme with several human rights monitors working in Darfur.

Despite these efforts, several reports by the UN and others showed that serious and massive violations continued. The reports made clear that the Government of Sudan was not taking sufficient action to stop violations, including by holding the perpetrators accountable.

i. The International Commission of Inquiry on Darfur

The UN Security Council members met in September 2004 and expressed their concern at:

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“the lack of progress with regard to security and the protection of civilians, disarmament of the Janjaweed militias and identification and bringing to justice of the Janjaweed leaders responsible for human rights and international humanitarian law violations in Darfur.”

The Security Council decided to act and established an International Commission of Inquiry on Darfur. The Commission, which was made up of a team of human rights experts, went to Darfur to:

“investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties, to determine also whether or not acts of genocide have occurred, and to identify the perpetrators of such violations with a view to ensuring that those responsible will be held accountable.”

Its report, published in January 2005, found that the Government of Sudan and the Janjaweed, and also the rebels, were responsible for serious violations:

“Based on a thorough analysis of the information gathered in the course of its investigations, the Commission established that the Government of the Sudan and the Janjaweed are responsible for serious violations of international human rights and humanitarian law amounting to crimes under international law. In particular, the Commission found that Government 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. These acts were conducted on a widespread and systematic basis, and therefore may amount to crimes against humanity. The extensive destruction and displacement have resulted in a loss of livelihood and means of survival for countless women, men and children. In addition to the large scale attacks, many people have

been arrested and detained, and many have been held incommunicado for prolonged periods and tortured. The vast majority of the victims of all of these violations have been from the Fur, Zaghawa, Massalit, Jebel Aranga and other so-called ‘African’ tribes.”



Photo # 133844

Credit: UN Photo/Tim McKulka

Victims of War in Sudan Receive Medical Treatment

National authorities in the country where the crimes were committed are responsible to investigate and prosecute serious crimes of the magnitude committed in Darfur.

The International Commission of Inquiry examined the response by the Government of Sudan and found that:

“The measures taken so far by the Government to address the crisis have been grossly inadequate and ineffective, which has contributed to the climate of almost total impunity for human rights violations in Darfur.”

The Commission noted that few victims complained because they had no confidence in the impartiality of the national justice system. It also observed that complaints are not properly investigated, also because **Sudanese laws** do not recognise international crimes and have procedural hurdles, such as immunity laws, that prevent effective investigations and prosecutions. As a

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result, the Commission only received information “of very few cases of individuals who have been prosecuted, or even disciplined...” It concluded that the “Sudanese justice system is unable and unwilling to address the situation in Darfur.”

The Commission stressed “the need to do justice” because:

“the magnitude and serious nature of the crimes committed against the civilian population in Darfur... demand immediate action by the international community to end these atrocities.”

The Commission examined possible options for holding perpetrators of serious crimes in Darfur accountable, including the possibility to establish a specialised international tribunal or a mixed (national/international) court. It concluded that the preferable option was to refer the situation in Darfur to the ICC because the Court is:

- * Best placed to deal with “crimes likely to threaten peace and security”;
- * The “only truly international institution of criminal justice” that may deal with the difficulty of investigations in Sudan;
- * The only mechanism that has the authority, which “backed up by that of the United Nations Security Council, might compel both leading personalities in the Sudanese Government and the heads of rebels to submit to investigations and possibly criminal proceedings;”
- * An international institution best suited to ensure a fair trial;
- * “could be activated immediately;”

- * “would not necessarily involve a significant burden for the international community.”

The Commission also recommended that an International Compensation Commission be set up for the benefit of the victims of crimes in Darfur, to be financed by the Government of Sudan and that a Trust Fund should be established.

ii. The UN Security Council referral of the Darfur situation to the ICC Prosecutor



Credit: UN Photo/Eskinder Debebe

Security Council chamber during the meeting on Sudan

All of the fifteen UN Security Council members recognised the need to respond to the crimes in Darfur. The majority in the Council (Argentina, Benin, Denmark, France, Greece, Japan, Philippines, Romania, Russian Federation, the United Kingdom and Tanzania) agreed with the Commission’s conclusion that the ICC would be the best mechanism to do this. The Security Council noted that the ICC should not only investigate and prosecute international crimes in Darfur but also “support international cooperation with domestic efforts to promote the rule of law, protect human rights and combat impunity in Darfur.” The Security Council ignored, however, the proposal of the

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Commission of Inquiry on Darfur to establish a Compensation Commission.

In the end, the UN Security passed a resolution (1593) in March 2005 and formally requested the Prosecutor of the ICC to consider opening an investigation into international crimes in Darfur.

“The human tragedy in Darfur is a matter of serious concern to us and to Africa, as it is to the international community. In that regard, in the interest of justice and accountability, we believe that further delay in reaching an agreement in the hope of a more desirable outcome would not serve the needs of justice or the aspirations of the people of Darfur to peace, justice and reconciliation... We are relieved that the Council has ultimately taken action on the matter... We strongly believe that the [International Criminal] Court is the most appropriate international organ for dealing with the situation in Darfur, as recommended by the Commission of Inquiry.”-

Tanzania, voting for Security Council Resolution 1593

iii. How was the ICC investigation relating to Darfur opened?

When the Prosecutor of the ICC was requested to examine the situation in Darfur in March 2005, he had to decide whether to open a formal investigation. The Prosecutor’s office collected thousands of documents, videos and interview transcripts, mainly from the UN Commission of Inquiry on Darfur. It also contacted a large number of groups and individuals to find out more about the situation.

The Prosecutor concluded that there is:

“a significant amount of credible information disclosing the commission of grave crimes within the jurisdiction of the Court having taken place in Darfur.”

The Prosecutor mentioned in particular the killing of thousands of civilians and widespread destruction and looting of villages, resulting in the displacement of nearly two million people. The Prosecutor also highlighted the large number of rapes and cases of sexual violence.

He also concluded that the international crimes had at the time not been genuinely investigated or prosecuted in Sudan, paving the way for the ICC investigation.

On 1 June 2005, the Prosecutor decided to open a full investigation into the situation in Darfur. The investigation is ongoing. On 28th February 2007, the Prosecutor made his first requests for summonses against persons against whom he believes there is reasonable grounds to believe bear criminal responsibility for crimes against humanity and war crimes committed in Darfur in 2003 and 2004.



Credit: UN Photo/Eskinder Debebe

Luis Moreno-Ocampo, Prosecutor of the International Criminal Court (ICC), addressing the Security Council at today's meeting on Sudan, at UN Headquarters in New York.

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iv. What is the position of the Government of Sudan concerning the ICC?



Fifth Plenary Session of the Assembly of States Parties of the ICC - 24 November 2006 General debate: Representative of Sudan [Credit: ICC-CPI]

The Government of Sudan signed the ICC Treaty in 2000 but has not yet ratified it. The signing of the Treaty means that Sudan should not act contrary to the object and purpose of it, i.e. it should not take any steps that impede the Court's goal of furthering international criminal justice.

However, when it comes to Darfur, the position of the Sudanese Government is that the ICC investigations violate its national sovereignty. It maintains that the Sudanese judiciary is capable, qualified and determined to ensure accountability. In its view, the Government has expressed that the ICC is a foreign policy tool used against weak

States. It claims that the international community employs double standards, where major powers do not have to face similar investigations.

The United Nations and most States, in Africa and elsewhere, as well as people all over the world and many in Sudan itself, disagree with the Government and see the ICC as the best possible option to ensure justice for international crimes in Darfur. Double standards in the pursuit of justice are lamentable and it is true that the international criminal justice system is still far from ideal. However, this cannot be a good reason for a failure to act. Accountability for international crimes must be pursued; victims deserve justice and have a right to it.

In spite of its opposition, the Sudanese Government has entered into agreements with the UN and has an obligation to cooperate under the UN Security Council resolution referring the Darfur situation to the ICC. The Government signed a Joint Communiqué with the UN in July 2004. Amongst other factors, it agreed to undertake measures to end impunity, in particular to investigate all cases of violations, to bring human rights violators promptly to justice and to enable women to bring charges against perpetrators.

The Security Council resolution referring the situation in Darfur to the ICC imposes an obligation on Sudan to cooperate with the Court. The Government has taken several measures to deal with the crimes in Darfur, following the referral of the situation to the ICC. However, as noted by the UN High Commissioner for Human Rights in October 2006:

“despite a number of measures taken by the authorities, notably the establishment of special courts and committees, impunity remains the norm in most cases of human rights violations in Darfur.”

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The Prosecutor of the ICC is monitoring these developments because he is only mandated to fully investigate and prosecute those responsible for a particular international crime where the case is not dealt with adequately by the Government of Sudan. The Prosecutor analyses both Sudanese law and practice to see whether those most responsible for international crimes in Darfur can and are brought to justice.

The Prosecutor of the ICC made its application to the Pre-Trial Chamber for summonses to appear in respect of Ahmad Muhammad HARUN and Ali Muhammad AH ABD-AL-RAHMAN (Ali KUSHAYB) on 27 February 2007. Shortly thereafter on 6 March, the Sudanese Government announced that it would bring proceedings in respect of suspects (including apparently Ali Kushayb) in a special criminal court in Geneina.

Under the ICC Statute, the Court cannot investigate or prosecute crimes if national authorities are genuinely willing and able to investigate or prosecute the case in the national justice system. The judges of the ICC will need to determine whether the Geneina prosecution is genuine, or merely an attempt to avoid the scrutiny of the ICC.

B. What is the ICC's mandate in relation to Darfur/Sudan?

What gives the ICC the right to investigate and prosecute crimes committed in Darfur?

The work of the ICC in Sudan is based on UN Security Council Resolution 1593 (2005) and the ICC Treaty. The UN Security Council "referred" the situation in Darfur to the prosecutor of the ICC. Without this decision to refer, the ICC

would not have had jurisdiction, that is the power to investigate and prosecute.

Where a State (such as Sudan) is not a party to the ICC treaty, it is normally only the UN Security Council that can activate the ICC's jurisdiction. The UN Security Council Resolution therefore gives the ICC the right to operate in Sudan and calls on parties to the conflict in Darfur, States, regional and international organisations to cooperate in proceedings. It also stresses the need to promote the rule of law, protect human rights, combat impunity as well as healing and reconciliation in Darfur.

What is the goal and role of the ICC in Sudan?

The UN Security Council found that the situation in Sudan is a threat to international peace and security. Requesting the Prosecutor of the ICC to investigate international crimes is one important step to end violence and bring back peace.

The role of the ICC is to:

- Ensure independent and impartial justice for international crimes in Darfur;
- In ensuring justice, promote the rule of law and reconciliation and prevent further crimes.

The ICC has a mandate to protect victims and witnesses in legal proceedings, though it can only do so with the support of national and intergovernmental bodies, as it does not have its own police force. The threat of prosecutions may also stop would-be perpetrators from committing (further) crimes.

The role of the ICC differs from that of the African Union and the United Nations in Sudan. The ICC does not have a peace-keeping mandate to protect the general

population in Darfur from further violations, though its actions may contribute to peace. At present, the troops of the African Mission in Sudan (AMIS) are in Darfur to prevent attacks and protect the population, in particular displaced persons. AMIS and the United Mission in Sudan (UNMIS) human rights officers may offer protection in individual cases. For example, they can and do ask the Government of Sudan to respect the rights of someone who has been detained.

There are plans to send UN peacekeepers to Darfur to provide better protection for the population. However, it is unclear whether and when these troops will come because of the current opposition by the Government of Sudan to their deployment.

What crimes can the ICC prosecute?

The ICC can prosecute genocide, crimes against humanity and war crimes committed in Darfur from 1 July 2002.

The ICC cannot investigate crimes:

1. Committed before 1 July 2002

The ICC cannot deal with crimes committed before 1 July 2002 because this is the date when the Treaty came into force. The power of the Court rests on the Treaty, which provides that the Court cannot investigate or prosecute any crimes committed before this time.

2. That may have been committed in other parts of Sudan

There are many violations that could possibly amount to international crimes that are reported to have been committed in Sudan over the last fifty years, in particular in the last two decades. There is a long list of recent

atrocities in various parts of Sudan, including South Sudan, the Nuba mountains and Eastern Sudan. There is also an ongoing history of systematic repression and violations against political opponents. The ICC cannot investigate and prosecute these other crimes as its mandate is restricted to Darfur after July 2002. The ICC will never be in a position to investigate or prosecute crimes committed before 1 July 2002, and the only way in which crimes committed in other parts of the country (after 1 July 2002) could come within the jurisdiction of the ICC is if the UN Security Council made another referral to that effect.

The Government of Sudan continues to be responsible to investigate with a view to prosecuting those responsible for international crimes anywhere in Sudan and to provide justice for victims as a matter of international law.

3. That are not recognised in the ICC Treaty

The ICC Treaty does not give the Court the power to investigate and prosecute all international crimes because it focuses on the most serious crimes of genocide, crimes against humanity and war crimes.

For example, the ICC can prosecute torture committed in the course of war or as part of a systematic practice because in those contexts it may constitute a war crime or a crime against humanity. Isolated cases of torture are still an international crime but do not fall within the mandate of the ICC. These cases can only be investigated and prosecuted by Sudanese courts. The same applies to isolated cases of other international crimes such as forced disappearances.

Note: The ICC will also be able to prosecute international crimes committed in neighbouring Chad on or after 1st of

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January 2007. This is the day on which the ICC treaty came into force in relation to Chad, which means that the Court has the power to prosecute crimes if requested by a State party to the ICC, including the Government of Chad, or if the Prosecutor so decides. This is important because violations possibly amounting to international crimes are being committed in the course of the conflict in Chad spilling over from Darfur, with the involvement of Sudanese nationals.

CASE STUDY

In 1994, the UN Special Rapporteur on the situation of human rights in Sudan concluded that “grave violations of human rights continue to take place, including large numbers of extrajudicial killings, summary executions, enforced or involuntary disappearances, systematic torture and widespread arbitrary arrests of suspected opponents.” According to a survivor of the execution of 68 imprisoned Nuba sheiks at the end of 1991:

“We were called for a chief’s meeting by the Government, but when we went we found there was no meeting. We were all arrested, detained and had our hands tied behind our backs. We spent 59 days in prison. We were 68 in the prison, all of us from the Nuba Mountains. One night, around 9 p.m., we were taken from the prison. I was shot in the back of the head. The bullet went through here and smashed my jaw. I fell unconscious... all the others died but I survived. I saw all the others around who were dead and I moved into the bush for four days.”

These violations are not known to have ever been investigated and prosecuted in Sudan.

Can the ICC investigate and prosecute these crimes?

No. The crimes were committed before 1 July 2002. Even if they had been committed after that date, the ICC has no powers to prosecute crimes committed in any parts of Sudan other than Darfur, such as the Nuba Mountains.

What can and should be done to ensure justice for these crimes?

The Government of Sudan remains responsible to fully investigate these crimes and prosecute those responsible. Victims, such as the survivor of the executions and family members, may also bring complaints in third countries with a view to prompt criminal investigations against those responsible. In

addition, victims may lodge a complaint against Sudan before the African Commission on Human and People’s Rights, claiming that Sudan is responsible for the violations and the failure to investigate, prosecute and punish the perpetrators and to compensate the victims.

C. Have international crimes been committed in Darfur?

The responsible courts have to decide whether and what international crimes have been committed in Darfur. The Prosecutor of the ICC stated in his December 2006 report to the UN Security Council that:

“Based upon a careful and thorough source evaluation of all the evidence collected, the Office has been able to identify some of the gravest criminal incidents and some of those individuals who could be considered to bear the greatest responsibility. The evidence proves that crimes within the jurisdiction of the Court were committed including: crimes against humanity (such as persecution, murder and wilful killing, rape and other forms of sexual violence, inhumane acts, beatings and deprivation of liberty, torture, imprisonment or severe deprivation of liberty, destruction of property and forcible transfer of civilians) and war crimes (such as wilful killings, extra-judicial killings, rapes, intentionally attacking civilians, inhumane acts, cruel treatment, outrages upon personal dignity and pillaging).”

Should the ICC Prosecutor decide to bring charges against any individual in relation to crimes committed in Darfur, the ICC judges will need to consider all of the available evidence in the usual way. As has already occurred in the case of Thomas Lubanga before the ICC, the ICC would first need to bring charges against

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a named individual or several individuals. The Prosecutor would need to provide evidence to support the charges in order for the charges to be confirmed by the Pre-trial chamber. A trial would only take place if the Pre-trial chamber is satisfied with the charges and formally confirms them.

If a case is taken to trial, the trial judges would have to decide whether the available evidence is sufficient to prove beyond a reasonable doubt in a fair and impartial trial that the accused is guilty of the offence charged.

The UN Commission of Inquiry has found that there is evidence to show that crimes against humanity and war crimes have been committed in Darfur. It could not find sufficient evidence for genocide but did not rule out that individuals might indeed be guilty of genocide. The ICC is not bound by the findings of the Inquiry and will make its own assessment.

Governments and non-governmental organisations have also stated and published reports indicating that international crimes have been committed in Darfur. Information contained in these reports may be used as supporting documentary evidence but the Sudanese Courts and/or the ICC have to make their own independent assessment. The Court can request and use evidence from a range of sources but it will decide what to make of the evidence before it.

D. Can the ICC prosecute those who benefit from Sudanese amnesty or immunity laws?

Sudanese law recognises immunity for certain officials who can only be prosecuted where the director of the forces concerned decides to lift the immunity. The ICC Treaty does not

recognise immunity laws that may act as a shield to prosecution. The reason for this is that these crimes are so serious that no individual should escape justice because of his or her official position. This is specifically written into the ICC Statute, and also aligns with the practices of other international courts.

In an important judgment, the Sierra Leone Special Court, which is a mixed national / international tribunal established to bring to justice the most serious crimes committed in that country, decided that local amnesty laws did not bar the Special Court from investigating or prosecuting international crimes.

The same would apply to amnesty laws insofar as they preclude the investigation or prosecution of those accused of international crimes.

In relation to the situation in Uganda, the ICC Prosecutor has affirmed that the Prosecutor's specific mandate for international justice should be clearly distinguished from those bearing the responsibility for establishing peace.

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IV. LEGAL PROCEEDINGS EXPLAINED: INVESTIGATIONS AND PROSECUTIONS IN DARFUR

A. How do ICC investigations work in Darfur?

The Role of the Office of the Prosecutor and the Pre-Trial Chamber

Sudan's criminal laws and procedures are historically influenced by common law and Egyptian law, with some elements of Shari'a law. Traditionally, courts had a strong role and the overall responsibility for investigations, arrests and releases on bail, with the investigatory work carried out by the police under the courts' supervision.

In the 1980s, the Attorney-General was given greater powers in investigations, arrest and prosecutions. At present, the Attorney-General is responsible at the pre-trial stage and supervises investigations conducted by the police. Magistrates have a more limited role and powers in investigations, such as taking confessions, renewing remand in custody and conducting general searches.

The ICC proceedings also have some common law elements but some of its procedures are not known to Sudanese lawyers, as they are influenced by civil law inspired by the French and continental European system. This system gives a much stronger and more active role to judges during investigations.

At the ICC, both the Office of the Prosecutor and the Pre-Trial Chamber play a role during investigations.

The Office of the Prosecutor has three main divisions to fulfil this task:

i) - Jurisdiction, Complementarity and Cooperation Division. This Division analyses State and UN Security Council referrals and other communications from victims, nongovernmental or other organisations and any other source, and considers whether the allegations may fall within the jurisdiction of the Court. The Division also communicates with States in a position to investigate or prosecute crimes on the basis of the principle of 'complementarity', which gives States the primary responsibility to exercise jurisdiction. The Division also works to secure the cooperation needed for the activities of the Office.

ii) - Investigation Division (with a special investigation team for Darfur). This Division is responsible for the conduct of investigations (such as collecting and examining evidence, questioning suspects as well as victims and witnesses).

iii) - Prosecution Division (with a special prosecution team for Darfur). This Division is principally responsible for the litigation of cases before the various Chambers of the Court.

The **Pre-trial Chamber** is a judicial body that has an active role and considerable powers to ensure proper investigations.

The Pre-Trial Chamber can:

- Request information from and review certain decisions of the Prosecutor;
- Decide on questions relating to admissibility and jurisdiction;
- Order measures relating to investigations, such as for the protection of victims and witnesses;
- It is also responsible for issuing arrest warrants and requests, monitoring detention and confirming charges.

Who else plays a role in proceedings: Victims, Witnesses and Defence?

In addition to the Prosecutor and the Pre-Trial Chamber, investigations also involve additional parties: those who allege that they have suffered harm (the victims); those who have seen or know something about a crime (the witnesses, who may be victims, but could also be bystanders or others with useful information), and the suspects.

In Sudanese law, victims may initiate a private prosecution for certain crimes but only with the approval of the Attorney-General or the Court. However, private prosecutions can be costly; there is no legal aid available for such prosecutions, and they are rare in practice.

Victims may also bring a civil claim for compensation in the course of criminal proceedings even if it is not a private prosecution. In national law, Sudanese officials enjoy immunity from both criminal proceedings and civil suits for any official acts unless it is lifted by their superiors. This immunity severely limits the effective exercise of victims' right to bring compensation claims. Outside of

the civil claim for compensation, victims have no right to make submissions or use other means to participate during criminal proceedings to make their views and concerns heard, and may only be called upon as witnesses. Witnesses are summoned by the court, either of its own accord or upon the request of the prosecution or defence.

The Sudanese National Interim Constitution of 2005 recognises defence rights, such as the right to a fair trial. Importantly, the rights contained in the *International Covenant on Civil and Political Rights* are guaranteed because international treaties to which Sudan is a party are an integral part of the Interim Constitution. However, laws such as the Sudanese Criminal Procedure Act and the National Security Forces Act do not fully incorporate defence rights, such as the right to be questioned in the presence of a lawyer and the right to challenge the legality of detention.

Before the ICC, victims and the defence each have an independent status in proceedings during which they can exercise their rights. Victims have the ability to participate even during the investigation phase to the extent that their personal interests are affected and the defence has a series of guarantees and rights to ensure just proceedings.

Article 55 of the ICC Statute (The Rights of Persons During an Investigation)

A person:

- (a) Shall not be compelled to incriminate himself or herself or to confess guilt;
- (b) Shall not be subjected to any form of coercion, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment or punishment;
- (c) Shall, if questioned in a language other than a language the person fully understands and speaks, have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness; and

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(d) Shall not be subjected to arbitrary arrest or detention, and shall not be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established in this Statute.

2. Where there are grounds to believe that a person has committed a crime within the jurisdiction of the Court and that person is about to be questioned either by the Prosecutor, or by national authorities pursuant to a request made under Part 9, that person shall also have the following rights of which he or she shall be informed prior to being questioned:

(a) To be informed, prior to being questioned, that there are grounds to believe that he or she has committed a crime within the jurisdiction of the Court;

(b) To remain silent, without such silence being a consideration in the determination of guilt or innocence;

(c) To have legal assistance of the person's choosing, or, if the person does not have legal assistance, to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by the person in any such case if the person does not have sufficient means to pay for it; and

(d) To be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel.

Witnesses, in contrast, are not a party to proceedings. Witnesses will only become involved if called upon by the Prosecutor, Defence Counsel or the Pre-Trial Chamber in the course of proceedings.

B. What steps has the Government of Sudan taken to investigate international crimes in Darfur?

Since 2004, the Government of Sudan has established several bodies tasked to examine violations, mainly in response to the UN Commission of Inquiry and the ICC investigation. These include:

- The National Commission of Inquiry;
- Ad Hoc Committees; and
- Committees against Rape.

Two institutions are responsible for investigating and prosecuting crimes to be tried by Special Courts:

- i) The Judicial Investigations Committee; and
- ii) The Special Prosecutions Commissions.

Several Special Courts have equally been established:

- In June 2005, the Government created a new **Special Criminal Court** with seats in Al Fasher, Nyala and Al Geneina. The Special Court can try:
 - any crime under the Sudanese Criminal Act and other criminal laws,
 - charges submitted by the Judicial Investigations Committee; or
 - other charges as determined by the Chief Justice.
- In September 2005, the Government established a **Specialised Prosecution Department for Crimes against Humanity**, with a Special Prosecutor with jurisdiction for the whole of Sudan.

Following amendments made in late 2005, the Special Prosecutor may also try crimes under "international humanitarian law". This change was made in response to concerns over the limited mandate of the courts because Sudanese criminal laws do not recognise international crimes as specific offences. However, the crimes have not been defined in Sudanese law and Sudanese courts have little experience in applying international crimes.

To date, the Government of Sudan has not taken any steps to carry out broader criminal law reform or train judges on relevant standards and procedures. The changes made to date would appear aimed at responding to the ICC

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investigations, in order to demonstrate that Sudan is willing and able genuinely to investigate and prosecute international crimes committed in Darfur.

The Government of Sudan has repeatedly stated that the Special Courts are evidence that it is capable of prosecuting international crimes committed in Darfur, and therefore that the ICC investigation is redundant.

According to its reports to the United Nations Security Council, the Office of the Prosecutor of the ICC has documented thousands of killings of civilians, including large scale massacres and hundreds of alleged rape cases.

The Government of Sudan stated in 2005 that it had identified around 160 suspects for investigation and prosecution for crimes in Darfur. However, by mid-2006 the first Special Court had only carried out six trials out of a total of 13 cases, According to information provided by the Government of Sudan to the ICC Prosecutor in late 2006, a further 14 persons had been arrested on suspicion of being responsible for “violations of international humanitarian law and human rights abuses” although it is not clear what crimes they are accused of. In practice, investigations are slow, there are few prosecutions, the jurisdiction of the special courts and other courts is not always clear, and judges work from a distance, as many of them are based in Khartoum.

Two military intelligence officers were convicted in August 2005 of murder for torturing to death a boy in custody. A member of the ‘Janjaweed’ militia was sentenced to five years imprisonment and 100 lashes for rape in August 2006. This is an exceptional case because the perpetrator confessed to his crime. Normally, persons suspected of rape are not prosecuted and remain at liberty.

This is because victims are often unwilling to complain because they may be prosecuted themselves for unlawful sexual intercourse. The crime of rape is also extremely difficult to prove because, in the absence of a confession, four witnesses are required to have witnessed the act of penetration. There has only been one case dealing with an attack against civilians in Tama, in which the defendants were cleared of war crimes charges.

Most cases before the Sudanese Special Criminal Court concern ordinary crimes such as armed robbery, receipt of stolen goods, possession of firearms without a licence, intentional wounding and murder. This gives the misleading impression that the crimes committed in Darfur are acts of banditry, ignoring the widespread and systematic nature of crimes. The defendants in cases before the Sudanese Special Criminal Court are mainly low-ranking military officials and civilians. Neither the Commissions nor the Court set up to deal with serious crimes in Darfur have investigated any possible links between individual crimes and the chain of command involving the army and other forces. There has not been any attempt to establish the systematic nature of the crimes even though many crimes appear to follow a similar pattern. No higher-ranking official or militia chief has been prosecuted for their role in the crimes committed in Darfur.

The Government of Sudan has also pointed to local reconciliation initiatives as alternative ways of dealing with crimes and settling them by traditional means. However, the ongoing violations and government involvement in the conflict seriously undermine any such reconciliation efforts. Also, the reconciliation initiatives do not appear to recognise victims’ rights and interests and the need for truth and justice.

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The ICC Prosecutor concluded that:

“it does not appear that the national authorities have investigated or prosecuted, or are investigating or prosecuting, cases...” that the [Prosecutor] is looking into.

This means that the ICC Prosecutor will continue its investigations because the Sudanese authorities have not done so yet.

Will the ICC prosecute cases where the suspects are investigated and prosecuted in Sudan?

It depends. As a general rule, a State, such as Sudan, should first have the opportunity to investigate international crimes and prosecute those responsible. The ICC will only investigate and prosecute cases where a state is ‘unable’ or ‘unwilling’ genuinely to do so itself. This is the so-called principle of complementarity. Out of respect for national systems, the ICC will only investigate and prosecute where:

- The national system does not function properly, for example there are no independent courts or the State is unable to arrest the accused or have access to the necessary evidence, or
- The State is not serious about investigating the international crimes and bringing the perpetrators to justice. This may be the case where there are delays that are not justified by the circumstances or in the case where there are investigations or prosecutions, where these are not carried out independently, are done in such a way to shield responsibility rather than to uncover the truth, or

fail to reflect the gravity of the offence.

An example would be a case of a senior official in charge of a bloody attack on civilians that would normally constitute war crimes and crimes against humanity, who is prosecuted for a lesser offence, and if found guilty, sentenced to a very lenient punishment only.

Another example would be if Sudanese authorities prosecuted ordinary militia members for an attack on a village but neither the leaders of the militia nor those responsible for aerial bombardments were investigated or prosecuted.

A third example is if Sudanese authorities fail to investigate or prosecute officials who are said to be responsible for genocide, crimes against humanity or war crimes, using the rationale that Sudanese immunity laws make such investigations or prosecutions impossible.

The ICC Prosecutor will consider the efforts made by Sudanese officials to investigate or prosecute for each specific case he selects. This means he will consider carefully throughout the investigations and prosecutions what steps the Sudanese authorities have taken to resolve a specific crime and to bring those responsible to justice.

The ICC may even prosecute cases where the national courts, such as the Darfur Special Courts, have tried a suspect of international crimes. It is a basic rule of justice that no one should be tried and punished twice for the same crime. For this reason, the ICC would only ever prosecute such persons where national prosecutions and trials are said to be a sham. This means that they were carried

out in such a way that it is clear that the purpose was not to investigate and prosecute the crimes as justice demands; Instead, the aim was to shield the perpetrators and to allow them to get away without due punishment.

C. What has the ICC Prosecutor done so far?

Since the beginning of the ICC investigations in Darfur, the Office of the Prosecutor has:

- Recruited a multi-disciplinary team of investigators;
- Developed a Darfur crimes database to store information on crimes committed. The office has identified particularly serious events (such as attacks on villages and massacres), crime patterns and the situation of witnesses and victims;
- Selected several events for full investigations;
- Worked on identifying persons most responsible for crimes;
- Collected thousands of documents from various sources;
- Took investigative steps in seventeen different countries, interviewing more than a hundred witnesses, including many victims of serious crimes in Darfur;
- Conducted several missions, including to Khartoum and to Chad, collected statements of witnesses, including Sudanese officials, and made or sought arrangements with the UN and others to provide information about crimes and perpetrators.

The Prosecutor has mainly collected two types of evidence:

1. Statements taken from victims and witnesses in several countries. The Prosecutor usually sends investigate teams to carry out interviews. These teams include psychologists and victims experts to make sure that victims and witnesses are willing to testify, are not put at risk and do not suffer from harm because of the way the interview is done.
2. Documents, such as reports, medical files and official documents that contain information about the conflict and specific crimes.

The Office of the Prosecutor has not officially visited the scene of crimes and investigated directly in Darfur which means that not much forensic evidence is available.

In June 2006, the Prosecutor said his office has documented thousands of direct killings of civilians, including several massacres, in particular against Fur, Massalit and Zaghawa groups. He also highlighted systematic attacks, sexual violence, looting and the destruction of property, including religious property and symbols, as well as attacks on humanitarian workers and peacekeepers.

In December 2006, the Prosecutor reported that his office has collected sufficient evidence to prove crimes against humanity and war crimes relating to “a series of incidents that occurred in 2003 and 2004.”

In end February 2007, the Prosecutor requested the Pre-Trial Chamber to issue summonses against Ahmad Muhammad Harun and Ali Kushayb.

i. Why does the ICC Prosecutor not investigate in Darfur?

The Office of the Prosecutor maintains that it is not practicable to carry out investigations inside Darfur:

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“the continuing insecurity is prohibitive of effective investigations inside Darfur, particular in light of the absence of a functioning and sustainable system for the protection of victims and witnesses.”

The Prosecutor has insisted that his office cannot ensure the safety of victims and witnesses and that it is therefore better not to take statements or collect evidence inside Darfur. He has maintained that his office is able to carry out effective investigations outside Darfur.

The Pre-Trial Chamber of the Court is concerned about the lack of protection of victims and witnesses in Darfur. In July 2006, it requested both Antonio Cassese (the Chairperson of the UN International Commission of Inquiry on Darfur) and Louise Arbour (the UN High Commissioner for Human Rights) to share their observations on what in their view should be done to improve protection of victims and preservation of evidence in Darfur. Both experts suggested certain measures to be taken, and the High Commissioner for Human Rights called for:

“an increased visible presence of the International Criminal Court in Sudan, as she believes that carefully tailored strategies can operate effectively to conduct investigations. The International Criminal Court’s presence on the ground would also importantly contribute, among other international deployments in the country, to a proactive presence increasing the level of protection perceived and enjoyed by the affected population.”

What these developments show is that various international experts and institutions have contrasting views on how best to conduct investigations in Darfur and to ensure victim and witness protection.

ii. Has the Government of Sudan cooperated with the ICC?

The Government of Sudan is obligated to cooperate fully and to “provide any necessary assistance to the Court and the Prosecutor” (UN Security Resolution 1593).

The Office of the Prosecutor has carried out five visits to Sudan to meet Government officials, judges and others. However, the Government of Sudan has not provided all documentation requested by the Prosecutor and has also not heeded all interview requests. The Prosecutor, for his part, does not appear to have requested permission to investigate inside Darfur and it is not clear how the Government of Sudan would respond to such a request. In public, the Government of Sudan has frequently denounced the ICC. Government authorities have harassed and intimidated Sudanese individuals and organisations who are seen as supporting investigations and prosecutions. To date, the Government has also not provided victims and witness with effective protection in Darfur.

It is not clear what would transpire if it was determined that Sudan failed to fully cooperate with the Court. This could for example be the case if the Prosecutor formally requests to go to Darfur and move around freely but the Government of Sudan refused. Another example would be if the ICC issued arrest warrants against Sudanese individuals and the Government would refuse to deliver such individuals to the Court. The decision of what to do in such cases ultimately lies with the UN Security Council that could take any of the measures within its powers.

In response to the Prosecutor's recent application to the Pre-Trial Chamber for

summons against Ahmad Muhammad Harun and Ali Kushayb, the Sudanese Government is reported to have said that it did not recognize the court's jurisdiction, did not intend to hand over anyone and would try any cases itself.

iii. What is the role of the African Union and the UN in the investigation?

The African Union and the United Nations are independent of the ICC although both organisations work together with the Court on the basis of agreements or other arrangements. The African Union and the United Nations monitor human rights violations and may and have shared information with the ICC if asked to do so. It is important to keep in mind that:

- Neither the African Union nor the United Nations are responsible for or directly take part in ICC investigations and prosecutions.

D. The summonses against Ahmad Muhammad HARUN and Ali Muhammad AH ABD-AL-RAHMAN (Ali KUSHAYB)

On 27 February 2007, the OTP gave a first glimpse about what its ongoing investigation in Darfur is considering. In a very important application, the OTP concluded that there are:

"reasonable grounds to believe" that:

- Ahmad Muhammad HARUN (Minister of State for the Interior and head of the 'Darfur Security Desk' at the relevant time); and

- Ali Muhammad AH ABD-AL-RAHMAN (also known as Ali KUSHAYB, who was the "Aqid al Oqada". or "colonel of colonels" in the Wadi Salih Locality of West Darfur and is said to have commanded thousands of Militia/Janjaweed),

bear criminal responsibility for crimes against humanity and war crimes committed in Darfur in 2003 and 2004.

The incidents that the Prosecutor mentions in his application can be summarized as follows:

Ahmad Muhammad HARUN

- management of and personal participation in, the recruitment of militia (Janjaweed) with full knowledge that they, often in the course of joint attacks with the Armed Forces, would commit crimes against humanity and war crimes against the civilian population of Darfur.
- knowing contribution to the commission of crimes against humanity and war crimes, including murder, rape, torture, inhumane acts, pillaging and the forcible transfer of civilian populations.

The crimes alleged in this application were perpetrated during attacks upon the towns and villages of Kodoom, Bindisi, Mukjar and Arawala.

Ali KUSHAYB

He is said to have personally led Militia/Janjaweed at the attacks upon Kodoom, Bindisi, Mukjar, and Arawala.

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i. A summary of the 51 Counts

- Persecution and murder of civilians in, and forcible transfer from, the **Kodoom** villages and surrounding areas constituting Crimes against Humanity
- Attacks against, and murder of, civilians and destruction of property, in the **Kodoom** villages and surrounding areas constituting War Crimes
- Persecution, murder, rape, forcible transfer of, and inhumane acts against civilians in **Bindisi** town and surrounding areas constituting Crimes against Humanity
- Attacks, murder and rape of civilians, and pillaging and destruction of property in **Bindisi** town and surrounding areas constituting War Crimes
- Persecution and murder of men, torture and imprisonment or severe deprivation of liberty in **Mukjar** town and surrounding areas constituting Crimes against Humanity
- Murder of men, attacks against the civilian population, pillaging and destruction of property in **Mukjar** town and surrounding areas constituting War Crimes
- Persecution. Murder of civilians, rape, and inhumane acts in, and forcible transfers from, **Arawala** town and surrounding areas constituting Crimes against Humanity
- Attacks against the civilian population, rape, murder of civilians, outrages upon personal dignity, pillaging and destruction of property in **Arawala** town and surrounding areas constituting War Crimes

ii. The 28th February 2007 Application - Questions Answered

Why were some of the names and places in the OTP's enumeration of the counts redacted (deliberately deleted from the public document)?

Many of the details relating to the crimes set out in the Prosecutor's request were blanked out (redacted). The reason for this is that the conflict continues in Darfur and the Court is under an obligation to ensure the safety and security of victims and witnesses. Inadvertently revealing details that could link back to information that might have been provided by particular victims and witnesses may be dangerous for their security, particularly where they continue to live in fear of further attacks.

If the case proceeds to trial, the Court is obliged to ensure that accused persons are capable of fully understanding the charges against them, so details will need to be disclosed to the defence, though not necessarily the public.

I am a victim of a crime in Darfur - what if the OTP didn't mention the village or type of crime that relates to what happened to me?

At his press conference on 27 February 2007, the Prosecutor indicated that his "*office is continuing to gather information about current crimes committed by all the parties in Darfur and is monitoring the spill-over of violence into Chad, including in the refugee camps, and into the Central African Republic, which are both State parties to the Rome Statute.*"

Consequently, it is possible that these continued investigations will lead to new

requests for summonses or indictments that relate to other villages and towns in Darfur and/or additional forms of victimisation.

What happened and continues to happen in Darfur is deplorable - why has the ICC only identified 2 people?

In Darfur, it is probable that hundreds of persons are responsible for international crimes. The UN Commission of Inquiry on Darfur identified 51 persons likely to be responsible for international crimes in Darfur. The list of 51 names, which has not been made public, apparently includes members of the Government of Sudan, the Janjaweed militia, rebels and foreign army officers acting in their personal capacity. The Prosecutor has seen the list in April 2005 but is not bound by it: he is free to prosecute only some of the persons on the list as well as individuals who are not on the list. The Office of the Prosecutor is also looking into the criminal responsibility of the four individuals against whom the UN Security Council imposed sanctions in early 2006.

It is extremely difficult to prosecute everyone responsible in cases of mass crimes. The Prosecutor of the ICC deals with a number of cases worldwide and the office is not able to prosecute all perpetrators.

The ICC Prosecutor's investigations in Darfur are ongoing and there are also some national proceedings as described above. The Prosecutor has not indicated how many individuals he hopes to investigate and prosecute, but the general policy of his office is to focus on the individuals that bear the most responsibility. Victims and others have a key role in pressing the Prosecutor to continue investigations in order that impunity does not prevail.

What if the Government of Sudan does not help facilitate the appearance of the two individuals before the Court?

The Government of Sudan is under an obligation to cooperate with ICC requests, even though it is not a State party of the ICC Statute. The reason for this is because the UN Security Council referred the case to the ICC, and the Government of Sudan is obligated to respect Security Council resolutions. If nonetheless, the Government of Sudan refuses to cooperate, the UN Security Council can take a range of measures to ensure compliance, such as condemnation through further Security Council resolutions, sanctions or other coercive measures.

What happens next?

The judges will review the application submitted by the Prosecutor and the evidence attached to it. If the Pre-Trial Chamber is satisfied that there are reasonable grounds to believe that the named individuals have committed crimes within the jurisdiction of the Court, the Chamber may issue either a summonses to appear or warrants of arrest against Ahmad Harun and Ali Kushayb.

The Sudanese Government, as the territorial State, has both the legal responsibility to facilitate the appearance of the individuals, and the ability to do so.

E. What happens after the investigation? - the arrest warrant, trial, and sentencing

In late 2006, the Office of the Prosecutor was preparing its first cases in relation to Sudan. The Office issued a statement

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indicating that the first charges would be brought in February 2007, and indeed at the end of February 2007, the Prosecutor applied for the first two summonses relating to the Darfur situation.

Arrest warrant or summons to appear

If the Pre-Trial Chamber issues a warrant of arrest, the Government of Sudan must arrest the persons and bring them before a domestic court to confirm that they are the persons sought. If this is the case, the Sudanese authorities must then transfer the persons to the Court in The Hague.

Upon the surrender of the persons to the Court, or the persons' appearance before the Court voluntarily or pursuant to a summons, the Pre-Trial Chamber will satisfy itself that the persons have been informed of the crimes which they are alleged to have committed, and of their rights under the ICC Statute.

Confirmation of charges

Within a reasonable time after the surrender or voluntary appearance, the Pre-Trial Chamber will hold a hearing to confirm the charges.

The Prosecutor will set out the charges against the individual(s). The Pre-Trial Chamber will call for a meeting with the Prosecution, Defence, and any participating victims or their representatives to confirm, amend or reject the charges.

The Pre-Trial Chamber's decision to confirm charges will depend on whether the judges believe that there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged.

On 29th January 2007, the Pre-Trial Chamber issued its first confirmation of

charges. These related to the case of Thomas Lubanga, from the Democratic Republic of Congo.

The Trial

Trials against those accused of international crimes, including in Darfur, will normally be held before the ICC Trial Chamber in The Hague but may also be conducted elsewhere, in particular in a place closer to Sudan where possible. The trial is public but some hearings may be held in private if necessary to protect victims and witnesses.

The accused is presumed innocent. The Prosecution has the burden to prove the case. The Prosecution will present its case, by presenting a range of evidence to the Court, such as witnesses, documentary or other types of evidence. The Defence can also present evidence, and witnesses can be cross-examined by the parties and questioned by the judges.

The judges will only convict an accused of a charge if they are convinced of his guilt *beyond reasonable doubt*.

ix. What are the rights of suspects and others during investigations?

The Bill of Rights contained in the **Sudanese National Interim Constitution** expressly recognises the right to be free from torture, the right to personal liberty and the right to fair trial.

The Bill includes "all rights and freedoms enshrined in international human rights treaties, covenants and instruments ratified by the Republic of Sudan", such as the International Covenant on Civil and Political Rights. However, these constitutional guarantees are not

reflected in statutory law. For example, the right to access a lawyer of one's choice is not explicitly granted for the initial stage of investigations, and legal aid is only available for crimes carrying the death penalty. Moreover, the right to access a lawyer of one's choice and the right to habeas corpus (challenging legality of detention before judiciary) are not guaranteed for investigations carried out under the National Security Forces Act. Furthermore, the lack of clear legal provisions that make confessions extracted under torture inadmissible and inconsistent judicial practice mean that torture is still used to extract confessions that are then recognised by the courts as evidence against the defendant.

The ICC Statute contains a number of guarantees to make sure that a suspect can defend him/herself properly and that the Court does not convict someone who is innocent. As a general principle, the Prosecutor or the Pre-Trial Chamber shall not force a person to incriminate himself or herself, not arbitrarily arrest or detain anyone, or coerce, ill-treat or torture a person. Where someone is being questioned as a suspect, he or she should be informed that he or she is suspected of having committed an international crime, and has the right to remain silent, the right to legal assistance, in particular a lawyer, and can demand only to be questioned in the presence of counsel. In the course of investigations, a suspect has further rights, which will normally be exercised by his or her lawyer.

x. How long will it take for first cases to be tried?

This is difficult to tell. ICC investigations in Uganda and the Democratic Republic of Congo have been going for more than 2 ½ years now. It has taken the Court over one year to issue the first arrest warrant and almost two years to bring the first

case to The Hague. The Prosecutor is still investigating other incidents and suspects in these two situations. These examples show that investigations are complicated and can take a long time.

xi. Verdict, sentence and imprisonment

After the trial, the Trial Chamber will decide whether the accused person is guilty as charged, guilty for some but not all of the charges, or not guilty. If the accused person is found guilty, he or she will be sentenced at a later date.

The Trial Chamber can impose a maximum of life imprisonment and a fine. It cannot impose the death penalty, no matter the crime.

It can also hear and decide on applications from victims for reparations (restitution, compensation and rehabilitation) and/or take a decision on reparations on its own motion. The trial chamber can order the convicted person to pay reparation to the victims or can order that reparation be made through the Victims' Trust Fund.

The verdict and sentence can be appealed by the Prosecutor and the Defence. Where confirmed, if the final judgment included a prison sentence, the Court would need to agree an appropriate location for the convicted person to serve his sentence. In the case of Darfur, it is unlikely that any sentenced person would be imprisoned in Sudan. Convicted prisoners are to be treated humanely and have to serve at least 2/3 of their sentence before they may be released.

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xii. What will happen to those not prosecuted by the ICC?

Many victims and those seeking justice are concerned that many of those responsible for murder, rape and other heinous crimes in Darfur will be allowed to get away without punishment. They might even continue to serve in the army or other official positions.

It is the duty of the Sudanese Government to investigate and prosecute the perpetrators and remove responsible officials from official positions.

While it is difficult to prosecute a large number of accused persons before any court even if the political will was there, so far, the Sudanese authorities have arguably not done enough. Only a very few crimes have been investigated and only a small number of prosecutions have taken place. Sudanese authorities have to do more to develop a policy of effective prosecutions.

If Sudan fails to investigate and prosecute those responsible, the victims of these crimes may take a case against Sudan before the African Commission on Human and People's Rights. The Commission may then ask Sudan to investigate and prosecute the violations. The failure to investigate and prosecute can also be taken up by the African Union and UN bodies, in particular the UN Security Council. They can urge the Government of Sudan to take appropriate action and, in case of failure, impose sanctions or other measures against Sudan.

Persons accused of international crimes can also be prosecuted in other countries even where they enjoy immunity or amnesties at home. It is only heads of State and some high-ranking government officials that are usually immune from prosecution in the courts of other

countries as long as they are in office. Many foreign States have laws that allow them to prosecute those suspected of international crimes that travel or live within their borders. A number of civil society groups worldwide work together to ensure that those responsible for the worst possible crimes should not be allowed to travel or live peacefully in other countries and should face prosecution and punishment instead. The better known perpetrators of international crimes in Darfur may well be the target of such prosecutions should they happen to leave Sudan.

While the prospects for full accountability for international crimes appears slim within Sudan, experiences from other countries shows that governments' perspectives on justice can change and what would have seemed unlikely in Sudan may well be very feasible five or ten or more years later.

F. What is the role of victims (and witnesses) during proceedings?

Victims of the most serious crimes have a range of rights, including

- the right to safety and security, including adequate measures to avoid reprisals, recriminations and retraumatisation;
- the right to dignity and respect throughout the proceedings, including the right to be heard and to express views and concerns in safety;
- the right to a remedy and reparation, including both access to the courts and adequate and effective measures of reparation such as restitution,

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compensation, rehabilitation and guarantees of non-repetition.

Despite these rights, national and international legal systems alike have often ignored victims' concerns. Victims have rarely been afforded the right to claim rights and raise concerns.

i. Who is a victim before the ICC?



Credit: UN Photo/Tim McKulka

A victim of recent fighting in Sudan receives treatment at the Malakal Teaching Hospital.

Many individuals and communities have suffered great harm and hardship in Darfur and they are all victims of the war. However, they may not all have the right to participate in legal proceedings or to claim reparations. The ICC Statute recognises individuals as victims only if they have suffered harm as a result of one of the ICC crimes. It also recognises organisations or institutions as victims if their property is dedicated to certain purposes (religion, education, art, science or charitable and humanitarian purposes, or historic monuments or hospitals) and is harmed as a result of one of the ICC crimes.

What is the difference between a victim and a witness?

A **victim** is someone who suffered harm as a result of one of the ICC crimes and has certain rights under the ICC statute. A **witness** gives evidence where called to testify before the Court. A victim of a crime may act as witness to give an account of what happened. Others, for example those who saw a crime but suffered no harm themselves, may equally appear as witnesses.

ii. Protection of victims and witnesses

Some form of trauma is the norm for victims that have experienced serious international crimes, rather than the exception. It is also likely that most victims testifying or otherwise participating at the International Criminal Court will have suffered some form of trauma as a result of their experiences. This fact will have an impact on the court structures needed to support victims, which will need to operate on a regular, as opposed to an exceptional basis.

The act of bearing witness is an important procedural means by which victims may seek redress. The *United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* lists a number of relevant safeguards for victims that are participating in criminal proceedings, either as witnesses or in other respects including, their right to be treated with compassion and respect for their dignity; the right to be informed of their role and the scope, timing and progress of the proceedings; allowing their views and concerns to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, taking measures to minimize inconvenience to victims, protect their

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privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation. Victims have the right to have their concerns taken into account, to give evidence in a 'safe space,' to be protected from future harm and from re-traumatization. They also will have physical and psychological needs on account of their experiences (e.g., physical disabilities, fear or shame associated with the recounting of very private events that they may not have revealed to family members or friends). These will make access to and collaboration with any judicial instance more complicated - and therefore requiring specialized efforts by such courts.

One of the goals of the ICC should be to restore dignity and humanity to victims who have been stripped of these things. The experience of testifying at an international court should not be a dehumanizing and dis-empowering experience.

Within the Registry of the ICC, a specialized unit has been created to provide victims and witnesses before the Court with a range of assistance and support including counselling and other services.

Furthermore, within the Office of the Prosecutor, specialized staff have been assigned to the Investigations Division to ensure that investigators are capable of dealing with particularly vulnerable victims.

Victims may be subject to harassment and pressure to dissuade them from testifying and afterwards as a form of reprisal. Taking practical steps to ensure victims' security both before and after will be essential to ensuring their continued willingness to cooperate with the procedure. Developing clear workable arrangements for protection is essential,

though particularly difficult in the cases under investigation by the ICC where conflict is ongoing and the involvement of local authorities in protection plans may not be advisable or even feasible.

Why is victim and witness protection important?

The security situation in Darfur and the lack of protection is a serious concern. One of the main priorities is to stop the fighting and to protect the whole population of Darfur. At the time of writing, this is not happening and the protection provided by African Union troops is generally seen as insufficient. The UN Security Council and others are therefore considering further measures, such as strengthening AU troops or sending UN peace-keeping troops, with a view to ensuring peace and protection.

As a fundamental rule, the State of Sudan is responsible for the protection of victims, no matter whether the risk comes from officials or others. However, the Government of Sudan has done little to ensure protection, neither in law nor practice. The **Sudanese laws** do not provide for an adequate protection of victims or witnesses.

As noted by the UN High Commissioner for Human Rights "Although Article 4 (e) of the Criminal Procedure Code of 1991 prohibits 'prejudice to witnesses' and Article 56 of the Code prohibits intimidating of witnesses during the trial proceedings and provide witnesses with the remedy of filing a complaint against the harasser, the law does not include provisions for the physical protection of victims and the relevant justice institutions (police, prosecution, courts) do not employ protective measures such as anonymous testifying or protective living arrangements."

In practice, "The Government of Sudan remains generally obstructive of any

international efforts to increase visibility and accountability for violations of international human rights and humanitarian law, and it has often retaliated against complainants and people who engage with the international community. Moreover, victims may be susceptible to retaliation from opposing tribal groups as the Darfur conflict becomes increasingly factionalised and ethnically-divided.”

How can the ICC protect victims and witnesses?

The Court, including the Office of the Prosecutor, has a legal duty to “take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims.”

There are a number of standard procedures that the Court takes to make sure that victims and witnesses are as safe as possible:

CARRYING OUT RISK ASSESSMENTS DURING INVESTIGATIONS:

Before any investigation mission, the Office of the Prosecutor draws up a report that assesses the risk for those to be interviewed. The Office of the Prosecutor will carry out meetings and interviews with victims and witnesses in such a way that the risk is minimised. If the risk for victims or witnesses is judged to be too high, the investigators may decide not to interview the victims or witnesses or may meet them at a later stage.

The investigators will not interview a victim or witness if he or she does not want to be interviewed. When interviews do take place, victims and witnesses are given contact details, in particular telephone numbers, where to reach the

Court in case of problems, such as threats.

PROTECTION MEASURES:

The Court will usually treat information received from or about victims as confidential. In individual cases before it, the Court can order specific protection measures. Victims or witness or their legal representatives can request protection from the Court, applying to the Victims and Witnesses Unit, which will then consider the request. The Pre-Trial Chambers may also grant protective measures of their own motion. These procedures are of great importance where the victim or witness fears that the perpetrator(s) or others will do him or her harm if they find out that he/she plans to or has given evidence.

There are a number of ways in which the Court can protect a victim or witness.

PROTECTING IDENTITY OF VICTIM OR WITNESS:

One of the main ways in which the Court seeks to protect victims and witnesses is to shield their identity from public records and at times, delay disclosure of their identities to parties in proceedings. For example, in the Prosecutor’s 27th February 2007 application to the Pre-Trial Chamber for summonses to be issued against Ahmad Muhammad HARUN and Ali Muhammad AH ABD-AL-RAHMAN (Ali KUSHAYB), the version of the Application that was released to the public had removed all names of victims and other details that could help to identify who they are.

A pseudonym may also be used for a victim, a witness or other person who may be at risk and a part of the proceedings may be conducted in private.

VICTIM AND WITNESS RELOCATION:

In some circumstances, it might be possible for witnesses or victims participating in proceedings to be

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relocated; to be move to a place where they are believed to be safe. This may either be in the same country or where this would be impossible or too dangerous, to other countries. Relocation is an exceptional measure and will only be considered if all other measures of protection are considered as inappropriate.

CASE STUDY

A victim of an attack on a village in Darfur has since fled to Chad where she lives in a camp. The victim gives testimony and applies to participate in Court proceedings. She tells other people in the camp about this. Militia men implicated in the attack hear about this and start to threaten her family members who are still in Darfur, saying that they will kill them if she does not stop what she is doing. A few days later, her frail mother is kicked in the back by unknown assailants.

What can the victim and her relatives do?

The victim has to decide carefully what she wants to do. She should inform the Court, in particular the investigators, the Victim Participation and Reparation Section and Victims and Witnesses Unit of the Registry, about the threats and the incident. These units will then have to decide what they can do, for example, they may be able to move the victim to another camp in Chad and they may be able to find a different place to stay for her family members.

Contact details for the Court can be found at the back of this Guide.

What has the Court done to protect victims and witnesses in Darfur?

The Prosecutor claims that the best way to protect victims and witnesses is to conduct investigations outside Darfur and not to contact victims directly in Darfur. For the investigations carried out outside Darfur, the Prosecutor uses standard procedures to make sure that victims and others who are interviewed about crimes are not put at risk, and can turn to the Court for help in case of danger.

The Pre-Trial Chamber of the Court has recognised that victims and witness protection is a serious problem in Sudan and asked experts to provide it with their observations on the issue.

The High Commissioner on Human Rights called for “an increased visible presence of the International Criminal Court in Sudan”, saying that “risks to victims must be assessed in light of a variety of factors, notable the advantage to the overall protection of a population that can be derived from an international presence, including a criminal investigation advancing and deploying its deterrent effect.”

International experience shows that it can be possible to investigate serious violations on the ground without putting victims at undue risk. What is important for the Court is to find out what the victims in Darfur themselves think about the situation and what should be done to enhance protection. Those working with victims in Darfur told REDRESS that:

“Last year the Prosecutor asked to go to Khartoum and he was allowed. Now he should come here. He should ask for permission. If the government could accept that would be a miracle. The investigators could then come to Darfur and collect evidence. This would not

create a danger as long as they are given permission... The presence of the ICC in Sudan, and especially in Darfur is really needed. It will not be easy, as there are many obstacles as we all know. In the meantime, protection could be enhanced by simply providing more information in Arabic. People have no information about the ICC so they do not feel confident about it. It does not exist for them, and this makes the sense of impunity for the militia stronger. If the Court could provide people on the ground with some information, it would allow them to understand what the ICC is, and what it is not. They might understand why it has taken so long.”

Can the ICC guarantee full protection?

No. The Court cannot provide ‘full’ protection in a situation of armed conflict; it does not have an army or police to enforce its orders. Even where the Court takes all possible measures of protection in individual cases, there will be a chance that the perpetrator(s) or others find out about the identity of victims or witnesses, or suspect that it must have been them who have given evidence. Some of those responsible for crimes in Darfur have gone to great length to intimidate victims and witnesses or to take revenge. Whoever gives evidence must be aware of the danger involved.

The Court, human rights organisations or lawyers working with victims and witnesses have a duty to inform them about this risk. If victims and witnesses are brave enough to give evidence, the Court and others have a continuing duty to ensure that protection is provided throughout proceedings.

iii. Physical and psychological support and assistance

Victims who want to exercise their right to participate and to apply for reparation will often not be able to do so without support and assistance, both material and psychological, from individuals and organisations in Darfur itself but also from the ICC.

Equally, victims who are witnesses and other witnesses will often not be able to give statements during interviews or to testify before the Court without such support and assistance. Victims and witnesses need support because they:

- have lived through traumatic experiences and suffer from these events, both physically and mentally;
- live under extremely difficult circumstances, such as refugee camps;
- have no money and have lost their homes and livelihoods, and
- don’t know how to give evidence and what to expect.

How can the ICC help victims and witnesses?

The Court can assist victims and witnesses in several ways:

- The Office of the Prosecutor, in particular the Gender and Children Unit (GC Unit), has psychologists and experts to make sure that victims of sexual violence, children, the elderly and disabled persons do not suffer mental harm from being interviewed. According to the practice of the GC Unit, victims should only give statements if they want to, if they are capable and if it will not be too much for them to tell their story. The Unit should also make sure that interviews are conducted by the right person (the victim will be asked whether he or she wants to be interviewed by a

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male or female investigator), at the right time and place and in the right language.

- The Victims and Witness Unit in the Registry is the key office at the Court for issues concerning protection and support. It is a neutral unit whose task is to enable victims and witnesses to testify, as well as to give advice on protection and support. It provides assistance and protection for victims and witnesses who appear before the Court. The Unit may also be able to assist where the testimony puts others, such as family members, at risk. The Unit provides logistical support and financial means to travel or for other activities necessary to provide evidence or to appear before the Court. It can also possibly cover costs and refer victims to use local services or networks that provide psychological counselling and care, in particular to vulnerable victims such as victims of sexual violence.

Contact details for the Victims and Witnesses Unit are found at the back of this Guide.

How could the ICC help victims of sexual violence?

In Darfur, there are a large number of victims of rape and other forms of sexual violence. Such victims do not only need protection and assistance just as others but also have special needs. Women and girls, and in rare cases men and boys, who have suffered rape, sexual enslavement or other forms of sexual violence often suffer from:

- stigmatisation (family, friends and community members see the victim as an outcast and change their behaviour or avoid contact altogether);
- trauma (nightmares, depression); and
- have a deep sense of distrust, in particular towards men.

The ICC Statute explicitly recognises rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization and other grave forms of sexual violence as war crimes in international and non-international armed conflict as well as crimes against humanity

The ICC has a number of ways to make sure that victims of sexual violence are treated with respect and obtain support.

Gender and Children Unit: the Unit has experts on the investigation and prosecution of gender crimes of a sexual nature. The investigators try to ensure that women do not suffer from having to give evidence. For example, their task is to make sure that the victims are interviewed by a female investigator (if requested) and to ask questions in a sensitive way.

Rules of Evidence: There are a number of rules to make sure that victims of sexual violence are not put in an uncomfortable position during trial. For example, the Court or the defence lawyers are not allowed to ask about the sexual conduct of the victim before or after the rape or sexual violence. The judges and prosecutors have to make sure that these rules are followed and legal representatives for victims should object to any such questions on behalf of the victim.

- Unlike what is usually required under Sudanese law, the ICC cannot impose a requirement of corroboration of a victim's testimony.
- Evidence of a victim's prior or subsequent sexual conduct is not admissible before the Court.
- The defense of consent is limited - consent cannot be inferred.

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The Court has a duty to give special attention to victims of sexual violence. Victims and their lawyers should demand protection and assistance where needed. During proceedings, lawyers need to make sure that victims of sexual violence are not questioned in such a way that they suffer harm, for example because their dignity is called into question.

As an exception to the principle of public hearings, the Chambers of the Court may, to protect victims and witnesses or an accused, conduct any part of the proceedings in private or allow the presentation of evidence by electronic or other special means. In particular, such measures shall be implemented in the case of a victim of sexual violence or a child who is a victim or a witness, unless otherwise ordered by the Court, having regard to all the circumstances, particularly the views of the victim or witness.

In order to ensure that the Court is sensitive to gender concerns, the ICC Statute requires the Court to take a number of pro-active measures:

- The statute requires that the need for a "fair representation of female and male judges" be taken into account in the selection process.
- The Registrar is required to appoint staff with expertise in trauma, including trauma related to crimes of sexual violence
- The Prosecutor is required to appoint advisers with legal expertise on specific issues, including sexual and gender violence.

How could the ICC help children?

Children in conflicts around the world are killed, tortured, sexually abused, forcibly displaced or harmed in other ways. They

experience loss or harm of loved ones as a result of international crimes and suffer severe trauma as a result. Darfur is no exception; many children have suffered terribly.

Thomas Lubanga from the Democratic Republic of Congo, the first person to be brought to The Hague to stand trial before the ICC, has been charged with the war crime of enlisting and conscripting children under the age of fifteen years and using them in hostilities.

Children differ from adults and experience crimes and the judicial process in different ways. They are often very vulnerable. It is important that the Court, lawyers and others dealing with children understand and respect the situation and special needs of children.

The Court can protect and support children in a number of ways:

- An expert or psychologist commonly joins the Office of the Prosecutor's investigation teams.
- The Registry also helps child victims who participate in proceedings and/or appear as witnesses. Children can be given support and counselling.
- The judges have to make sure that hearings with children should be child-friendly, for example using the right language, and should not intimidate children.

How can the ICC help human rights defenders in Darfur?

Human rights defenders work in a very difficult situation in Darfur. Many of them have been harassed, detained, prosecuted, injured or even killed for the work they do.

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The ICC has no express mandate to protect human rights defenders and it is not clear what it may do for lawyers and others at risk. However, the Court can and must minimise any risk, for example by keeping the role of human rights defenders confidential where asked to do so. Human rights defenders should inform the Court, in particular the Office of the Prosecutor and the Pre-Trial Chamber, and, where they represent victims, the Victims Participation and Reparations Section, about any form of harassment they encounter. The Court may request the Government of Sudan to stop harassing those who work with the ICC. The Court has a right to do so because the Government of Sudan must cooperate with investigations and prosecutions.

iv. The right to participate

Active participation of victims in criminal proceedings is still largely unknown in **Sudan's criminal justice system**. Normally, victims may complain about a crime but thereafter have no independent status during proceedings. Victims cannot make statements and formally submit their views to the court because their role is largely limited to being witnesses.

There is one procedure where victims play a more active role by privately prosecuting offenders for *quisas* crimes. However, this right has significant limitations:

- It only applies to the crimes of murder and those causing wounds-it excludes a series of crimes that would be part of the crimes of genocide, crimes against humanity and war crimes, such as destruction of property, displacement and violations causing mental suffering;
- It is not an independent right but subject to the approval of the Attorney-General;

- Where the *quisas* crime has been committed by an official, the perpetrators may benefit from existing immunity laws that block prosecutions.

The limited role of victims in proceedings is not unique to Sudan; other criminal systems also give little recognition to victims as participants in criminal proceedings.

However, it is more and more recognised in many national legal systems that victims should have a more active role in proceedings. Criminal justice should ultimately benefit victims as much as society as a whole.

It is important for victims and organisations to participate in order to make their views and concerns known. This could prompt the Prosecutor and/or the Court to take measures in the interests of victims. Examples are better protection or a stronger focus on certain crimes if victims think that the Prosecutor or Court does not deal with them as they should.

CASE STUDY (COMMISSION OF INQUIRY)

In January 2003, around 3,000 Janjaweed and army soldiers attacked the village of Tarna. One victim of the attack recounted how her brothers were shot and how she and her five sisters were beaten and abducted.

"When we arrived at Wadi Tina, I saw at least 95 women there...All the women were naked. Soon after our arrival we were forced at gun point to take off our clothing. Around 8h00 in the morning of the second day at the Wadi, I was raped for the first time. A very large group of Janjaweed arrived at the Wadi. They selected a woman each and raped them. Over a period of a week, I was raped 14 times by different Janjaweed. I told them to stop. They said 'you are women of Tora Bora and we will not stop this.' We were called slaves and frequently beaten with leather straps, punched and slapped. I feared for my life if I do not have sex with them. We were humiliated in front of other women and were forced to have sex

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in front of them. Other Janjaweed were watching.”

Why may the victim of these acts of sexual violence want to participate in proceedings before the Court?

The Prosecutor of the Court may decide that he does not have sufficient evidence or that he will focus on other crimes. The Pre-Trial Chamber may also decide that there is insufficient evidence to charge the alleged perpetrators. The victim has already given testimony to the Commission of Inquiry and may also be prepared to act as witness before the Court. In addition, it is important to participate because this would enable her to explain to the Court why it is so important to focus on the crimes of sexual violence, which may constitute crimes against humanity and war crimes, and to prosecute those responsible, such as militia leaders. She may also try to find and join other victims of the same attack and rapes so that all of them can speak with one voice and ask the Court to take their interests and concerns into account. While there is no guarantee that the Court will do what the victims wants it to, it will at least consider their views and may act accordingly.

Other reasons to participate include:

- Victims may also respond to applications by the defence to release a suspect pending completion of investigations, arguing that the release would harm their interests and put them at risk. On the basis of such arguments, the Pre-Trial Chamber may reject the release of the suspect.

- Make observations to the Court during an investigation. For example, he or she may disagree with a decision not to go ahead with an investigation or a case, or on the kind of charges brought against the accused (for example, a rape victim may ask the Court to prosecute rape as war crime where the accused has been charged with the war crime of killing civilians only)

- Put questions to a witness or experts who give evidence before the Court. This can only be done with the permission of the judge upon application by the legal representative of the victim. A victim may also ask the accused questions if the judge allows it.

A VICTIM WHO WISHES TO PARTICIPATE IN ICC PROCEEDINGS NEEDS TO:

- find about his or her rights before the Court;

- decide whether to participate in a case, because of the effort and the possible risk of such a move; and
- know how to apply, or know people or organisations who can apply on his or her behalf.

Art 68(3) of the ICC Statute provide that victims whose personal interests are affected can present views and concerns to the Court at stages and proceedings determined to be appropriate by the Court and in a manner that is not prejudicial to or inconsistent with the right of the accused and a fair and impartial trial.

The ICC system of participation shares certain features of the *partie civile* system that exists in certain civil law jurisdictions, where victims may become involved in the criminal procedure as a civil complainant. The ability for victims to participate in proceedings other than as witnesses is novel for international criminal proceedings; it is one of the areas which deviates from the procedures of the ad hoc tribunals for the former Yugoslavia and Rwanda. The rules of procedure of the ad hoc tribunals merely link the criminal conviction of the perpetrator with the ability for the victim to claim reparations before a national jurisdiction.

The test in Article 68 is in a certain respect a balancing test - victims have a right to participate where their interests are affected to the extent that such participation does not unduly infringe upon the rights of accused or a fair and impartial trial. While it will ultimately be for the judges to determine how this article is to be interpreted in practice, the test does not imply that certain rights are more important or valid than other rights.

The United Nations Declaration of Basic Principles of Justice for Victims of Crime

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and Abuse of Power recognizes that “a person may be considered a victim, under this Declaration, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim,” yet in order for victims to be able to participate in ICC proceedings, they must be able to demonstrate that particular proceedings against a specific accused affect their interests.

Despite the words of the Declaration, the Court will need to determine how close a connection must exist between victim and accused for victims’ interests to be sufficiently affected.

For example, will the Court only enable participation of those that suffered directly from the crimes or also family members; must the victim fall within the series of acts perpetrated by the immediate person that is accused before the Court or can they fall within the broader series of events in a particular town or region in which the Prosecutor is inquiring? Here, it is important to recall that the Prosecutor will only be in a position to investigate a few select cases this might restrict the range of victims that may participate in proceedings.

Criteria to participate: A Summary

FIRST PHASE: WHO CAN PARTICIPATE?

In order to participate, a victim must make an application to the Registry. An applicant must be able to demonstrate that:

a. He or she is a victim of a crime within the jurisdiction of the statute, in other words someone who has suffered

harm as a result of genocide, crimes against humanity or war crimes. The victim will need to demonstrate that he or she suffered some degree of harm. The judges will have to determine on a case by case basis whether there is sufficient harm. The Pre-trial chamber has determined in the Democratic Republic of Congo cases, for example, that family members of abducted child soldiers would satisfy the test.

Rule 85 Definition of victims

(a) Victims. means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court;

(b) Victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.

b. Their personal interests must have been affected. The judges will decide on a case by case basis, including at different stages of proceedings, what the personal interests of victims are and whether they have been affected. For example, in the Lubanga case in the Democratic Republic of Congo, the Pre-Trial Chamber identified as personal interests of victims the clarification of the facts, punishment of the perpetrators and ability to request reparation. The Appeals Chamber considered that the decision whether to release Lubanga affected the interests of victims because, if released, the suspect could potentially obstruct the investigation, commit further crimes and constitute a further threat to the victims.

c. There must be a connection between the harm that was suffered and the crimes before the court. The judges will determine on a case by case basis how close the connection needs to be. The applications to participate in the Democratic Republic of Congo proceedings are instructive. At the earliest phase of proceedings before an

arrest warrant was issued, the Pre-trial Chamber was quite broad in considering whether a connection was evidenced. In later phases of proceedings, once an accused person had been identified and for the confirmation of the charges, the Pre-Trial Chamber was much narrower, requiring there to be a connection between the victim/applicant and the allegations made against the accused person.

SECOND PHASE: WHEN AND HOW TO PARTICIPATE?

a. **Victims can participate at stages of proceedings considered to be appropriate.** The judges have a certain discretion to determine what is 'appropriate', but already in the jurisprudence before the Court, the Pre-Trial Chamber has allowed victims to participate at the earliest phases of proceedings, namely the investigations phase known as "situation." This may be even before an arrest warrant or summons is issued, the point at which a situation becomes a "case."

b. **Victims can participate in a manner that is not prejudicial to or inconsistent with the right of the accused and a fair and impartial trial.** This test is more complex. So far, the Pre-Trial Chamber has held in respect of Democratic Republic of Congo applicants whose identities were not disclosed to the defence out of fear for safety and security, that the manner in which they could participate would be limited, in order to safeguard defence rights. The Pre-Trial Chamber has also prevented victims who were accorded the right to participate in the broad investigation of crimes in the Democratic Republic of Congo (situation) from participating in proceedings relating to the case of Thomas Lubanga, when it could not be shown that they suffered harm as a result

of the crimes alleged by the Prosecutor in relation to Mr. Lubanga.

Is it safe to participate?

A victim who participates becomes a participant in legal proceedings. This means that information about his or her identity and suffering may be transferred to the accused and may become public. Despite the best efforts to maintain the safety, confidentiality and privacy of victims and witnesses, people may find out that a particular individual is participating and the nature of the crimes, which may be culturally or socially sensitive. Perpetrators or those close to them may try to intimidate or harm victims; this is because victims who participate can influence proceedings, and may play an important role in the prosecution of particular crimes and/or perpetrators by providing the ICC with vital views and information.

What victims can do about the risk:

- Participants should think twice before telling anyone other than the Court about the application. It is usually safer for the participant if the application is kept confidential.
- The Court itself will try to make sure that the information about the identity and the case of the victim is not known to outsiders, though at a certain stage it is likely that it will need to disclose certain information to the accused.
- Victims who do not want specific information to be known, such as their name or circumstances that make it easy to identify them, (e.g., the name of a village), must specifically request, preferably in their application, that such information is not communicated to the Defence or the Prosecutor as

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appropriate and not included in public records. The Court will deal with such a request and may, for example, decide that the Court should not contact victims directly, but only through their legal representatives. Where victims do not have any legal representatives, the Victims and Witnesses Unit or the Victims Participation and Reparation Section at the Registry may be given the task to contact victims and ensure confidentiality.

- Victims who have applied to participate and who are threatened may contact the Court for help, either in person or through their lawyer.

v. How to apply to participate in proceedings before the ICC?

WRITTEN APPLICATION: Victims who want to participate in proceedings have to make a written application to the Registry. This application can be made by the victims themselves or by their legal representative or other person acting on their behalf for example where the victim is a child or disabled. The victim may also prefer someone else to act for him or her.

APPLICATION FORM: The ICC Registry has developed a written form for applications. This form is only available in English or French but may at some point be available in Arabic. (The official guide on how to use the form is available in Arabic). The web link to the English form is here: http://www.icc-cpi.int/library/victims/Form-Participation-1_en.pdf.

Note: Where someone other than the victim submits an application, he or she needs to give their details. The person also needs to show that he or she is acting with the victim's consent or in

what capacity he or she is acting for the applicant, if the victim is a child, disabled or deceased.

A victim or others are free to apply without using the form but there is a risk that they may not include all information required. In that case, the Registry may ask for more information and the application may be delayed.

In Darfur, for example, a woman who says that she has been raped by militias, such as in Wadi Tina in North Darfur in 2003 described above, has to state in as much detail what happened:

- Date and Time (When?)
- Location (Where?)
- Number and appearance of Perpetrators (Who and how many?)
- Violence inflicted and physical and mental harm suffered (What?)

What to do where it is difficult to prove that a person is a victim: It might be difficult for a victim to provide the information required, for example because he or she has suffered so much that he/she cannot clearly remember details and there are no other witnesses. A victim may also have no medical evidence because he or she did not get form 8 in Darfur or could not see a doctor in time after the crime happened, which often happens in rape cases. A victim should explain to the Registry why he or she cannot provide these details or pieces of evidence and ask the Registry what other information he or she should or could send in order to be recognised as a victim.

WHERE TO SEND THE APPLICATION FORM: Application forms and relevant documents, filled in either in English or French, should be sent to the Victim Participation and Reparation Section (VPRS) at the Registry. Victims who would like to fill in the form in Arabic should

contact the VPRS first to find out whether this is possible and whether it may lead to delays (The address of the VPRS is available at the back of this publication)

What supporting documents need to be provided?

The application form asks for proof of identity, authorisation, and other documents, such as proof of death or medical documents, where available. A victim should complete the form as fully as possible, or provide the required information otherwise, and submit it even if he or she cannot answer all the questions or provide all the supporting documents requested.

The **Victims Participation and Reparations Section** of the Registry is one of the most important offices for victims because it is meant to assist them with any questions or procedures relating to participation, reparations and legal advice. In its own words, the VPRS “informs victims of their rights relating to participation and reparations in the ICC, and enables them to submit applications to the Court if they wish to do so. It also assists victims to obtain legal advice and to organise their legal representation.”

WHAT TO EXPECT NEXT: The Court will acknowledge that it has received the application and give the applicant a reference number. The applicant or those working for him or her, for example a lawyer, should use this number when communicating with the Court. The Victim Participation and Reparation Section will pass on the application to the judges dealing with the situation and case.

WHEN SHOULD VICTIMS APPLY? Victims may apply at any stage; the Pre-Trial Chamber of the Court may decide that victims are entitled to participate in an investigative situation (even before an arrest warrant is issued) where their

personal interests are affected. For example, victims of village bombardments and rapes in Darfur have an interest to make their views heard even if no individual perpetrator has been identified yet. This is important because victims can have a say in telling the Court what they think should be done about particular crimes. Victims also have an interest to share their views and concerns on other issues, such as victim and witness protection.

Once the Court identifies particular crimes and starts proceedings against individuals, a victim who wants to participate in that case has to show that he or she is a victim of the crimes that have been attributed to those individuals. For example, where the case concerns the bombardment of villages in West Darfur only, the victim of village bombardments in North Darfur may be able to participate in the investigative situation but not in the proceedings that relate to individuals who are only accused of crimes committed in West Darfur. Also, where someone, for example a military commander, has been charged with war crimes for ordering an attack on civilians but not for his role in rapes, a victim of such rapes will not necessarily be allowed to participate in the particular case unless the charges are amended even though it is the same perpetrator.

HOW LONG WILL IT TAKE? The application to participate procedure will usually take a few months from filing the application to the final decision by the Pre-Trial Chamber. The Court will inform the victim and his or her legal representative of the decision. If the applicant is entitled to participate, the Court will give him or her information on the next steps. If the Court rejects the application, the applicant may apply again later in proceedings. The applicant may also wish to withdraw his or her application; in such a case, he or she

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should contact the Court for further information.

CASE STUDY

JIA and HAH Zaghawa tribe- arrested from Bajo village in March 2005 by military officers and the Janjaweed militias. The men were taken to a military camp. At the Military camp, the Janjaweed militias shot and killed Mr. J. Mr. H. was then taken to a hole in the ground by the militias and subjected to torture. Mr. H. was beaten with sticks on his head and ears, and flogged on his back. Mr. H. sustained serious injuries to his left ear because of the torture. He was subsequently charged with 'waging war against the state' and 'abetment of mutiny' under the 1991 penal code.

Who can apply to be recognised as a victim before the ICC?

- The relatives of Mr. J., who has been killed, may be recognised as victims of a crime that the ICC can investigate and prosecute. This is because the extrajudicial killing may amount to a crime against humanity and a war crime, if it is shown to be part of a systematic or widespread practice.
- Mr. H. has been tortured. He may have also been arbitrarily detained and the arrest may be part of the persecution of members of the Zaghawas tribe. These acts may constitute crimes against humanity and a war crime.

What can Mr. H. and the relatives of Mr. J. do?

If they want to be recognised as victims before the ICC, Mr. H. and the relatives of Mr. J. have to apply, either to participate in proceedings and/or to claim reparation. The Court (Pre-Trial Chamber) will then decide on whether there is enough evidence to show that they have been a victim of one of the crimes falling within its jurisdiction.

They can also approach the Office of the Prosecutor in order to provide evidence.

which the other rights of victims (to be free from re-traumatization; to participate in proceedings; to claim reparations) may be realised. Legal representation for victims is in this way, both an additional right afforded to victims under the Statute as well as a method by which other rights afforded to victims may be exercised. Legal representatives are intended to play a key role in explaining the Court's procedures to victims and advising them of their rights and will be important interlocutors for victims throughout the proceedings.

Legal representatives will face a number of challenges in representing victims. Unlike defence counsel, legal representatives for victims will typically represent large numbers of persons and groups. Their clients will often be far from where the legal representatives themselves are situated, and these clients may themselves be dispersed in different regions of a country and/or beyond borders and regions. Clients' interests will be multiple and diverse, despite their shared association to a particular situation or case before the Court.

When there are large numbers of victims, the statute and rules foresee the appointment of a common legal representative for victims. Encouraging and at times requiring victims to have a single legal representative will streamline the procedure and should ensure that the participation of victims does not prejudice the right of the accused and a fair and impartial trial. Undoubtedly, there will be conflicts of interest and differing objectives amongst sub-groups of victims. For instance, certain subgroups of victims may have specialized concerns (e.g., victims of sexual violence) or due to the nature of the conflict giving rise to the crimes, subgroups of victims may not want to be jointly represented with other subgroups.

vi. Legal representation

The Statute also entitles victims to be legally represented in proceedings. This ability is intended to be a key means by

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It may also be a challenge for a single common legal representative to take instructions from a large group of victims - especially in contexts of mass displacement where victims involved in a single case could potentially be located around the world. Careful thought would also need to be given to how best to help the most vulnerable victims to participate. They will have the least access to lawyers and may be most vulnerable to re-traumatisation.

The Court has also developed an innovative structure for legal representation of victims, including a dedicated public-defender style system. The Office of Public Counsel for Victims, based at the premises of the Court in The Hague, is responsible for providing advice and guidance to legal representatives located elsewhere. Staff of this office will undertake subsidiary functions (including acting as a type of duty counsel) but it is also foreseen that the staff will in certain circumstances be appointed as legal representative for groups of victims during the proceedings before the Court.

Can victims get help from a lawyer or others to represent them?

Yes. A victim is free to choose a legal representative.

Any lawyer or organisation can help a victim to prepare and submit an application. However, strict rules apply for the next step of representing the victim in legal proceedings before the Court.

A lawyer or legal representative can only represent a victim if he or she:

- Knows and has worked on questions of international criminal law and

procedure as a criminal lawyer, judge or prosecutor for ten years;

- Is able to speak either English or French, the working languages of the Court, or another language, such as Arabic, if adopted as a working language of the Court in a particular situation; and
- Applies to be registered on the list of counsel maintained by the ICC Registry, and is so registered.

A lawyer who fulfils these requirements can request to be put on the Court's list of counsel. If a person is on the list, he or she is authorised to represent victims or the accused, or both.

A lawyer who has at least five years of legal experience can apply to be put on the list of assistants. Assistants can work with the main legal representative.

A lawyer wishing to be included on the Court's list of counsel must send several documents to the Registry of the Court, Division of Victims and Counsel

(Ref: List of Counsel), PO Box 19519, 2500 CM The Hague (The Netherlands)), which must according to the Court include:

- [Candidate application form](http://www.icc-cpi.int/defence/defcounsel.html) (available on the ICC website <http://www.icc-cpi.int/defence/defcounsel.html>);

- [Certificate of good standing](http://www.icc-cpi.int/defence/defcounsel.html) (available on the ICC website <http://www.icc-cpi.int/defence/defcounsel.html>);

- Original or certified copy of registration with governing body;

- Valid practicing certificate;

- Certificate issued by the relevant authority of each State of which the person is a national or where the person is domiciled stating the existence, if any, of criminal convictions;

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- Detailed curriculum vitae, allowing for appraisal of the candidate's competence and experience;
- Valid copy of professional insurance policy;
- Legible copy of birth certificate;
- Legible copy of identity card;
- Legible copy of passport/travel document;
- Two passport size photographs

There were no Sudanese lawyers on the list of counsel in late 2006. It would be desirable to have lawyers from Sudan on the list that could represent victims. Where Sudanese lawyers have less than 10 years of the required experience in international criminal law or criminal law and procedure as well as in criminal proceedings, they may instead apply to be put on the list of assistants. Another problem is that the Sudanese Bar may for political reasons not issue lawyers with the certificate needed. It is not clear what the Court will do if a lawyer has problems with getting the certificate from the Bar.

If a lawyer believes he or she is qualified but is denied the certificate from the Sudanese Bar or has difficulties providing any of the other documents needed, he or she can contact the Defence Support Section at the Court to discuss the situation further and see whether and how he or she can be put on the list.

Common Legal Representatives

Special rules apply where there are a number of victims, such as in Darfur. The Court can ask victims to choose a common legal representative when it would not be practicable for every victim to have his or her own lawyer.

The ICC Registry may help the victims in choosing a representative from the Court's list where they have difficulties in finding a suitable representative or agreeing on the right person(s).

The Court may also ask the Registry to choose a common legal representative.

The Court has an independent Office of Public Counsel for Victims that has its own counsel, may represent victims if asked to do so, and may provide advice and assistance. Victims who do not agree with the decision of the Court or do not want to be represented jointly, can request the Court to review its decision, explaining why they Court should do so.

For victims in Darfur who have suffered similar violations and who want to participate in proceedings, it will be important to find the right lawyer(s) or others who have expertise and experience to represent them. Local human rights organisations have expertise but also know lawyers from around the world who might be able to help in these cases. Victims may also contact the Court for advice, and the Court may be able to suggest suitable lawyers.

Is legal aid available?

The Court may be able to provide some legal aid to victims who do not have funds to pay for a legal representative. In such a case:

A victim or victims need to show that they do not have sufficient income or assets.

The **Office of Public Counsel for Victims** provides its legal services for free. The Office is an independent body at the Court that can advise and provide support to victims and their potential lawyers on any legal questions to do with participation, such as whether a victim is

entitled to participate in a particular situation. This may also include undertaking legal research and advice for them. The Office may also appear before a Chamber in respect of specific issues to do with victims' rights. The Office itself may also exceptionally act as legal representative for victims or a group of victims in the course of proceedings before the Court.

Contact details for the Office of Public Counsel for Victims are located at the end of this Guide.

Will the Court inform victims about developments in their case?

Yes. The Court has to inform victims who participate or their legal representatives as well as victims who have communicated with it about:

- A decision of the Prosecutor not to initiate an investigation or not to prosecute. This is important because if victims believe that the Prosecutor should prosecute a particular crime or particular perpetrators, they can tell the court that this decision is not in their interests.
- A hearing to confirm charges against a suspect. This gives victims or their legal representatives the opportunity to submit their views on the crimes for which the suspect will be or should be tried.

The Court also has to inform participating victims and their representatives about:

- Any proceedings before the Court, including dates of hearings and decisions, as well as requests, submissions and motions and other documents.

This information gives victims and their legal representatives the chance to prepare for hearings and to respond to any developments that concern their interests.

The Court will inform those victims who participate and their representatives in writing. It might not be able to write directly to other victims who have communicated with the Court but do not participate; in such a case, the Court can inform them publicly, for example through the local media or radio broadcasts.

vii. What can lawyers do?

Lawyers have a special role because they can directly represent or assist victims, or the accused, before the ICC and/or help victims who do not want to participate directly. Lawyers can also support any investigations or prosecutions before Sudanese courts or the ICC. In order to take an active part and use the ICC in the best possible way, it is crucial for lawyers to understand how the ICC works and how they can work with the ICC.

How can lawyers seek justice for international crimes in Darfur?

Lawyers can take various steps to promote justice for crimes in Darfur. Lawyers can pursue cases before local bodies and courts and before international bodies, such as the African Commission on Human and Peoples' Rights to claim human rights violations and the ICC in criminal cases. They can also document cases, together with doctors and other human rights defenders, and provide information to the UN or the ICC. Lawyers may also write reports to inform the public about the crimes committed, the law and practice of implementation, or lack of it, and what should be done to bring

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perpetrators to justice and to provide victims with redress.

How can lawyers help victims in Darfur?

- INFORMATION

Lawyers should ask victims who come and meet them about what they wish to do and would like to know, and provide them with the necessary information. It is also important for lawyers to talk to community representatives and groups of victims about the ICC and victims rights. Lawyers can also speak on justice for victims of crimes in Darfur on the radio or television and/or distribute written information about the ICC, be it in the print media or independently.

It is particularly important for lawyers to inform victims about their rights so that they know what to expect and can decide what they want to do. For example, information can help victims to decide whether to bring a case before local courts or to get involved before the ICC, either as participating victims or witnesses or both. Victims also need to know what they can expect if they decide to participate or apply for reparation in proceedings before the ICC. Victims need to know:

- The difference between human rights (civil) and criminal proceedings;
- what local remedies are available;
- what regional human rights remedies (African Commission) can be pursued;
- how ICC investigations and prosecutions work;
- what the ICC can do to bring perpetrators of international crimes to justice;
- what their rights are during proceedings, in particular regarding participation and reparation;

- why it is or can be important for victims to exercise their rights;
- what lawyers can do for them;
- what to expect at the various stages of proceedings;
- how long it will take; and
- what risks it might involve.

- CONFIDENTIALITY

Lawyers should treat victims with respect and make sure that they conduct interviews in such a way that victims do not feel threatened or uncomfortable. It is important that victims are given the choice to decide what they want to do. For security reasons, the information given by victims should be treated as confidential. Lawyers must take great care not to put victims or witnesses at risk and should not take action where the victim is concerned and clearly does not want them to do so. This is not least because lawyers are bound not to disclose information given to them by a client, by the ICC's code of conduct for counsel and applicable national rules.

- PROTECTION

Lawyers can take several steps to protect victims. In individual cases, they can, where appropriate, apply to the local authorities and courts, inform AMIS, UNMIS or others and contact UN Special Rapporteurs for help. They can also contact the ICC Victims Participation and Reparations Section and/or the Victims and Witnesses Unit of the ICC and ask for advice and support for the individual at risk. Lawyers may raise public alerts so that those who threaten victims or witnesses are persuaded not to harm the individual.

In cases concerning large groups of people, such as displaced persons living in camps, lawyers play an important role in documenting the situation, expressing their views on the most appropriate forms of protection and asking local and

international bodies to provide such protection.

- SUPPORT AND TREATMENT

Lawyers can also work with doctors, social workers, NGOs and others to make sure that victims receive support, treatment and care. It is important for a lawyer to advise a survivor, for example, that he or she can go and see a doctor or social worker, for example at a local treatment and rehabilitation centre.

- PARTICIPATION

A lawyer who is on the ICC list of counsel may represent victims before the Court at all stages of the proceedings where the Pre-Trial Chamber decides that victims may participate.

- REPARATION

Where victims claim reparation, lawyers should specify in as much detail as possible on the harm suffered by the victim and make a specific request for compensation and other forms of reparation.

A lawyer represents a victim of sexual violence. After she has been recognised as a victim, her parents have been killed in an attack on her village. The lawyer now wants to know whether he can raise her concerns in respect of this incident as well, or what procedure he has to follow.

He also faces another problem because he is unable to attend the forthcoming hearing before the Court at which the victims' case will be discussed.

What can the lawyer do?

The lawyer may ask the Office of Public Counsel for Victims to:

- Provide advice on his query because it relates to ongoing proceedings;
- Act as ad hoc counsel for the forthcoming hearing.

How can lawyers help those suspected or accused of having committed international crimes in Darfur?

Lawyers can provide suspects and accused persons with information about their rights and how ICC proceedings work. Where a lawyer is on the list of counsel or on the list of assistants, he or she may be assigned to represent (i) the interests of the defence in general; (ii) a suspect; or (iii) an accused person or may be contracted by an accused person directly. The lawyer can then make submissions to the Court on behalf of the suspect or accused. The lawyer can question decisions or steps taken by the Court that may violate the rights of his or her client, and may urge the Court to take specific steps to ensure his or her client's rights. Interventions by lawyers may concern the jurisdiction of the ICC, which has already been challenged by a Sudanese ad-hoc counsel before the Pre-Trial Chamber, as well as issues relating to the rights of other parties, such as the Prosecution and Victims. It may also include questions of procedure, for example informing his or her client of rights before questioning, evidential matters, such as what evidence is admissible, and issues relating to arrest, verdict, sentencing and appeal.

Defence lawyers and/or suspects or accused can obtain support and assistance from the Office of Public Counsel for the Defence at the Court, which in particular offers legal advice and training.

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viii. Reparation

Reparation is an important right recognised in most national legal systems and international law. It is a fundamental legal principle that there should be a remedy for any wrong done.

As a general rule, reparation should restore the situation as it was before the crime, such as giving back property that has been stolen. However, this is often not possible, for example rape, torture or mass killings are crimes that by their nature cannot be 'undone'. In these cases, victims should receive compensation and the required medical and social services. But reparation goes beyond money; it includes in particular that those responsible acknowledge the violation publicly, are punished, and that victims' suffering is recognised.

In Sudan, the Interim National Constitution recognises international human rights standards and includes the right to litigate. Victims of crimes may be able to sue individual perpetrators for compensation as part of criminal proceedings or in separate civil cases (however in cases relating to public officials only if their immunity is lifted), and the State is liable for violations committed by its officials. However, the Sudanese legal system does not have any legislation giving victims of international crimes an express right to reparation. In practice, victims have hardly received compensation or other forms of reparation because it is difficult to bring cases against perpetrators, in particular against officials because of immunity laws.

The Darfur Peace Agreement concluded in May 2006 envisages the establishment of a property restitution commission and a compensation commission for victims of war. This is an important first step to provide reparation but the commissions have not been set up yet and the

Government of Sudan has pledged minimal money for initial compensation. As recognised by the UN International Commission of Inquiry on Darfur and others, there is the need for Sudan to set up a fund or mechanism to provide adequate reparation to all victims of international crimes during the conflict.

Can a victim obtain reparation from the ICC?

Yes, the ICC is the first international criminal tribunal that expressly recognises victims' right to reparation, which includes restitution, compensation and rehabilitation.

In practice, not all victims of international crimes in Darfur will be able to obtain compensation or other forms of reparation through the ICC:

- The Court only rules on the international crimes before it by the Prosecutor; it cannot consider all international crimes committed in Darfur.
- The victims of crimes not tried by the Court will not receive any reparation as part of a judgment. However, they may receive assistance from the Victims' Trust Fund established under the ICC Statute.

What are the possible forms of reparation?

The ICC recognises three principle forms of reparation:

- restitution - restoring the victim to the extent possible to the situation which existed prior to the violation;
- compensation - providing funds to repay the victim for his or her losses arising from the injury;

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- rehabilitation - providing psychological or physical rehabilitation support.

The ICC can make individual awards to victims or can provide symbolic and collective forms of relief. Symbolic forms of reparation may include public acknowledgment and commemoration, such as memorials. Collective forms of reparation may consist of measures benefiting communities, such as rebuilding schools and access to health and education services for victims of crimes.

CASE STUDY (PHR)

The village of Furawiya in North Darfur was repeatedly attacked from the air in 2003. It was completely destroyed in January 2004 when Janjaweed militias and Government troops entered the villages, killed and raped the villagers who had not fled already, burnt the homes and looted valuables and livestock.

The surviving villagers lost everything and became refugees in their own country. According to an estimate, "if every household in this one village alone had an average of two fully grown camels valued at a minimum of \$500, the loss in Furawiya of camels would be more than 2.5 million US dollars."

One survivor named Hadia stated that her family lost four donkeys, 20 cows, 15 camels and 100 sheeps and ghosts, besides having their home burnt down and other possessions destroyed or stolen.

How can the victims of Furawiya obtain reparation?

The survivors may apply to the Court and ask for reparation.

- The Prosecutor of the Court may decide to prosecute the attacks. In this case, if the accused is convicted, the Court may make an order against the perpetrator to pay compensation and other rehabilitation.

Alternatively, it may ask the Victims Trust Fund (whose role is explained below) to provide, such as rebuilding the village and setting up schemes to enable the villagers to return to their old way of life as far as possible. The money will most probably not be enough to compensate fully for the loss but may allow taking some measures for the benefit of the victims.

- In case victims do not obtain reparation from the Court, they may claim compensation and other reparation before any existing Darfur reparation commissions or the Sudanese Courts. If they are not successful, they may bring a case against Sudan before the African Commission on Human and Peoples' Rights, claiming that Sudan is responsible and owes justice and reparation to the victims.

Does a victim need to formally request reparation before the ICC?

A victim should apply to the Court for reparations. This is the best way to make sure that the Court will consider his or her application when it makes its decisions.

The Court may also decide that it will award reparation where victims have not made a request. This is important because many victims might not be able to apply for reparation. The Court can consider their rights when making a decision.

Victims are of course free to reject reparation. They may even ask the Court not to make an order for reparations in their particular case, for example because they don't want to accept money from the perpetrator. The decision whether or not to claim and/or accept reparation is independent from criminal proceedings; this is unlike Shari'a law, where accepting diya (blood money) means that a court cannot impose serious punishments envisaged for quisa crimes (murder, involuntary manslaughter and bodily injury).

How to apply for reparations

WRITTEN APPLICATION: A victim or his/her legal representative can make a written application to the Victims Participation and Reparations Section at the Registry at any time before the Court

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makes an order on reparations at the end of trial.

TIME LIMIT: Currently, there is no time limit for making applications, though the Trial Court may decide to set a timeline for applications shortly before it takes any decision on reparations.

ADVANTAGE OF APPLYING EARLY: Where the Court has identified a case, it is best to apply as early as possible. A victim or his or her legal representative may in particular ask the Court to seize any assets from the suspect for the benefit of victims. This can be done as soon as an arrest warrant is issued. The Court can seek state cooperation in order to seize assets and take other steps for the benefit of victims.

FORM/LETTER: Victims in Darfur and those working with them may want to use the form on reparations developed by the Victims Participation and Reparation Section to ensure that all necessary information is given to the Court. This is not the same form used for participation. Victims don't have to use the form and can simply write a letter to the Court, addressed to the Victim Participation and Reparation Section (VPRS). The letter should be written in English or French. If a victim wants to use Arabic, he or she should contact the VPRS for advice. The letter must contain the following information:

PERSONAL INFORMATION: Identity and address (Who is the applicant)

INCIDENT:

- Description of injury, loss, harm (What, for example in case of the attack on the Furawiya village: a house built of ...material with ... rooms... burnt down; four donkeys, 20 cows, 15 camels stolen-
- For attacks on the person, in addition to medical and other costs, the physical and mental injuries and

consequences of the violations, such as rape, need to be described);

- Location and date of incident (Where and when); and
- To the extent possible identify persons responsible (Who-describing what alleged perpetrators looked like, which kind of dress/uniform they wore etc.).

CLAIMS FOR RESTITUTION, COMPENSATION AND REHABILITATION:

- Where restitution of stolen goods is sought, description of items (such as cattle and livestock);
- Claims for compensation (based on value of property and livestock lost and/or expenses as well as physical and psychological harm);
- Claims for rehabilitation and other forms of remedy (for example, access to medical services)

SUPPORTING DOCUMENTATION:

- To extent possible, relevant supporting documentation including names and addresses of witnesses as well as medical reports.
- It might be difficult for a victim to provide the information required because he or she has not been able to see a doctor and does not know the names or whereabouts of witnesses. A victim should explain to the Court why he or she cannot provide the information and ask the Court what other information he or she could send in order to be recognised as a victim for reparation purposes.

What happens next?

The Registry should keep those who have applied informed about proceedings. The Court will inform registered victims if and when any trials begin. Victims and their legal representatives can then make representations about reparations, for example on the freezing of assets of

accused persons and on appropriate forms of reparation.

The Registry will inform other victims, interested persons and States about any ruling by the Court on reparations. This is important because it will give other victims the chance to consider whether they want to apply for reparations. Victims, local and international organisations, and States may also have the opportunity to comment on or to assist with any reparations that the Court plans to award. Victims who have not done so may also make a formal application at this stage.

viii. The Victims' Trust Fund

Partly because of the difficulties in enforcing reparations orders against individual perpetrators, the States Parties of the ICC decided to establish a trust fund for victims and their families. As Archbishop Desmond Tutu stated at the inaugural ceremony for the Trust Fund in April 2004: 'The law alone cannot repair the scars of war, and survivors need financial support to rebuild their lives.'

What is the Trust Fund?

The Trust Fund is an independent body governed by a Board of Directors established for the benefit of victims. Its task is to provide support and rehabilitation to victims, manage funds for reparation and make awards for reparation.

The Trust Fund can receive money from the assets from convicted perpetrators and/or voluntary contributions from states and other sources. The Trust Fund will complement the Court's mandate to receive and decide upon victims' claims for reparation lodged against convicted perpetrators.

The Trust Fund can use its resources to:

- Provide victims with support before or after the final verdict of the Court;
- Help the Court to implement reparations orders following an order by the Court to do so.

The Trust Fund will most probably be responsible for collective awards. This will in particular be the case where it is not possible to give individual victims back their property or full compensation because of the number of victims.

The Trust Fund has been set up only recently and it is still not fully clear how it will be working. The Trust Fund has received little money today, around 2.4 million Euros, and it remains to be seen what measures the Fund can take for the benefit of victims. What seems to be clear is that the Trust Fund will not be able to provide full compensation to all victims.

The Board of Directors

The Trust Fund is presided over by a Board of Directors, which was elected by the Assembly of States Parties on 12 September 2003. The members of the Board are Madame Minister Simone Veil of France; His Excellency Mr Tadeusz Mazowiecki of Poland; His Grace Archbishop Emeritus Desmond Tutu of South Africa; Mr. Arthur Napoleon Raymond Robinson of Trinidad and Tobago; and Mr. Bulgaa Altangerel of Mongolia. Madame Minister Veil was elected as Chairperson by the Members of the Board at their first meeting in April 2004. Each member of the Board serves in a personal capacity for a three-year term with the possibility of re-election once.

The role of the Board of Directors is to 'establish and direct the activities and projects of the Trust Fund and the allocation of the property and money

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available to it, bearing in mind available resources and subject to the decisions taken by the Court’.

The Board is required to consult as far as possible victims and their families or their legal representatives before establishing and directing the activities and projects of the Trust Fund.

What reparation can the Court provide for victims in Darfur?

This is not clear. The Court has not yet had the opportunity to award reparations in any case.

There are a large number of victims in Darfur, most of whom have suffered severely. Many have lost their relatives, homes, property and cattle. Where possible, the Court may order that the perpetrators return stolen or occupied property or, where they have been destroyed, compensate the victims. For other crimes, such as killings, rape or torture it will normally only be possible to pay compensation or to provide other forms of reparation.

It is difficult to estimate the amount of money needed to compensate for the harm and loss caused in Darfur. But it is obvious that several billion dollars would be needed for adequate compensation. However, only a small number of those responsible will be prosecuted. Many of them may not have any or much money or they may be able to hide their assets from the Court. This means that relatively little money can be expected from those who will be convicted of crimes.

The Trust Fund may have additional money from voluntary contributions from individuals, governments and other bodies. However, the Trust Fund has so far not raised large amounts and it will have to use its money for victims of

crimes in other countries as well. The Trust Fund will most probably be able to provide some collective and symbolic forms of reparation for victims in Darfur, however, it will certainly not be able to give full compensation to all victims.

Alternative avenues for reparation

The Government of Sudan is legally responsible to provide reparation for any crimes committed by Sudanese officials or by militias acting under their control or with their support. Others, such as rebel forces, are also responsible to provide reparation.

Victims may be able to obtain reparation from individual perpetrators or the Government of Sudan. They can use compensation commissions, Sudanese courts, the African Commission on Human and People’s Rights or courts in foreign countries. However, there are a series of obstacles with regard to each of these remedies, making it difficult to claim reparation successfully.

DARFUR COMPENSATION COMMISSION:

The Darfur Peace Agreement concluded in May 2006 recognises that displaced persons in Darfur have the right to restitution of their property. The Agreement also recognises the right to compensation for “war-affected persons”, defined as “persons or groups of people who have suffered persecution during the conflict in Darfur as well as those whose life and livelihood have been adversely affected as a result of the conflict.” The Commissions responsible to give back property and to provide compensation are not yet fully established or working. The Government of Sudan has agreed to give \$30 million as an immediate contribution but it is not clear when and how the additional money needed will be provided. It is also not

clear how the Commission will award other forms of reparation. The initial sum set aside for compensation is too low to provide meaningful compensation. It remains to be seen if, how and when the Commissions will become operational.

SUDANESE COURTS: Victims of international crimes may also use the Sudanese courts to claim compensation. There are only very few cases where victims of violations have received restitution or compensation by Sudanese courts. Most crimes committed in Darfur are not, and will most probably not be investigated and prosecuted before Sudanese courts. This means that most victims will not be able to obtain reparation and even for the few that may do, amounts of compensation are normally small.

AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS: Victims who have unsuccessfully tried to obtain reparation in Sudan may also take their case against Sudan before the African Commission on Human and Peoples' Rights. The Commission usually takes around two years or so to reach a decision. It could find that Sudan is responsible, either

- for the violation itself, such as rape by army soldiers, or
- for the failure to investigate and to provide reparation, or both.

In such a case, the African Commission can ask Sudan to investigate the crimes, pay compensation and take other measures. This has happened in several cases in the past. However, the Government of Sudan has not implemented these decisions to date.

FOREIGN COURTS: Victims may also take their cases to courts in other countries, though it is very difficult for victims to be successful. Foreign courts usually don't allow suits against States because of rules on state immunity, according to which a

State may not be brought before a court in another country.

ix. What is the Court doing so that victims know what is happening and what they can do?

Many victims of international crimes in Darfur do not see and know what the ICC is doing and are becoming frustrated. There is a lot of talk in Sudan and in Darfur in particular about the Court and what it can do - but there is no ICC office in Darfur and no Court members have officially visited Darfur. Little if any official information about the ICC is available in Arabic or other local languages. Human rights activists in Darfur talk about the ICC but even for them it is not always clear what the ICC is doing or planning to do.

The Court has stated that it wants to do more but believes that it is not possible to hold meetings with civil society in Sudan at the moment. There are no plans to go to Darfur anytime soon. In the near future, the Court plans to use radio broadcast programmes on the Court and the media to report about its work. It also wants to distribute written and other materials, such as cassettes and videos, with basic information about the Court and victims' rights. Sudanese and international human rights organisations have repeatedly called on the ICC to be more active in reaching out to victims in Darfur and in making information about its role and work available in Sudan, in particular in Darfur.

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x. How can victims of crimes in Darfur and others contact the ICC?

Victims may want to contact the Court for a number of reasons:

- Telling the Court about crimes and possibly act as witness
- Wanting to find out how to participate or how to apply for reparation
- Asking for protection and/or support
- Obtain information about what the Court is doing.

Individuals who are victims of crimes in Darfur can write to the ICC (see address at the back of this Guide). They cannot contact the Court in Darfur because there are no offices or contact persons. In the region, victims can only contact the Court in the Chad office in Abeche.

If requested, the Court will inform victims what it can do for them and how victims can get involved. The Court has a special unit to do this, the **Victims Participation and Reparations Section at the Registry**.

The Prosecutor is interested to find out more about any serious crimes committed in Darfur since July 2002 and the possible perpetrators. Victims and anyone who wants to share information or give a statement, in particular where they are outside of Darfur, should contact the Court, in particular the Office of the Prosecutor responsible for investigations and prosecutions.

xi. What can human rights defenders do to support justice in Darfur?

In Sudan, many individuals and groups, including lawyers, doctors, social workers, journalists and others, play a crucial role in working for human rights. They can and have taken action to seek justice in Darfur by:

- Collecting, sharing and publishing information about human rights violations in Darfur, including identifying those responsible;
- Helping victims. Human rights defenders can protect victims and give them medical and psychological aid. They can also try to bring legal cases for victims and to speak out for them in public;
- Advocating for human rights in Darfur and working with others, including government officials, on how to stop more violations and bring about justice;
- Publicly discussing what the Government of Sudan, the ICC and others are and should be doing to bring perpetrators to justice and to assist victims of atrocities in Darfur;
- Keeping in contact with the ICC and providing the Court with information about crimes committed, the identity of perpetrators and victims, or even testify as witness, as well as informing the Court what people on the ground expect from the ICC.

APPENDIX

SELECT PROVISIONS OF ICC LEGISLATION

ICC Statute

PART 2. JURISDICTION, ADMISSIBILITY AND APPLICABLE LAW

Article 5

Crimes within the jurisdiction of the Court

1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

- (a) The crime of genocide;
- (b) Crimes against humanity;
- (c) War crimes;
- (d) The crime of aggression.

2. The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.

3. Nothing in paragraph 2 (c) and (e) shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means.

Article 11

Jurisdiction *ratione temporis*

1. The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute.

2. If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under article 12, paragraph 3.

Article 12

Preconditions to the exercise of jurisdiction

1. A State which becomes a Party to this Statute

thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.

2. In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:

- (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
- (b) The State of which the person accused of the crime is a national.

3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.

Article 13

Exercise of jurisdiction

The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:

- (a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;
- (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or
- (c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.

Article 14

Referral of a situation by a State Party

1. A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes.

2. As far as possible, a referral shall specify the relevant circumstances and be accompanied by such supporting documentation as is available to the State referring the situation.

Article 15

Prosecutor

1. The Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes

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within the jurisdiction of the Court.

2. The Prosecutor shall analyse the seriousness of the information received. For this purpose, he or she may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court.

3. If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence.

4. If the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case.

5. The refusal of the Pre-Trial Chamber to authorize the investigation shall not preclude the presentation of a subsequent request by the Prosecutor based on new facts or evidence regarding the same situation.

6. If, after the preliminary examination referred to in paragraphs 1 and 2, the Prosecutor concludes that the information provided does not constitute a reasonable basis for an investigation, he or she shall inform those who provided the information. This shall not preclude the Prosecutor from considering further information submitted to him or her regarding the same situation in the light of new facts or evidence.

Article 16

Deferral of investigation or prosecution No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.

Article 17

Issues of admissibility

1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:

(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State

is unwilling or unable genuinely to carry out the investigation or prosecution;

(b) 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;

(c) 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;

(d) The case is not of sufficient gravity to justify further action by the Court.

2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:

(a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;

(b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;

(c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

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

PART 3. GENERAL PRINCIPLES OF CRIMINAL LAW

Article 22

Nullum crimen sine lege

1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.

2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.

3. This article shall not affect the characterization of any conduct as criminal under international law independently of this Statute.

Article 23

Nulla poena sine lege

A person convicted by the Court may be punished only in accordance with this Statute.

Article 24

Non-retroactivity *ratione personae*

1. No person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute.

2. In the event of a change in the law applicable to a given case prior to a final judgement, the law more favourable to the person being investigated, prosecuted or convicted shall apply.

Article 25

Individual criminal responsibility

1. The Court shall have jurisdiction over natural persons pursuant to this Statute.

2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.

3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

(a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;

(b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;

(c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;

(d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

(i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or

(ii) Be made in the knowledge of the intention of the group to commit the crime;

(e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;

(f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

4. No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.

Article 26

Exclusion of jurisdiction over persons under eighteen

The Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime.

Article 27

Irrelevance of official capacity

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

Article 28

Responsibility of commanders and other superiors

In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

(a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

(i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

(ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

(b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

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(i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;

(ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and

(iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

Article 29

Non-applicability of statute of limitations

The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations.

Article 30

Mental element

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.

2. For the purposes of this article, a person has intent where:

(a) In relation to conduct, that person means to engage in the conduct;

(b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

3. For the purposes of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly.

Article 31

Grounds for excluding criminal responsibility

1. In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct:

(a) The person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law;

(b) The person is in a state of intoxication that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law, unless the person has become voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to engage in conduct constituting a crime within the jurisdiction of the Court;

(c) The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph;

(d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:

(i) Made by other persons; or

(ii) Constituted by other circumstances beyond that person's control.

2. The Court shall determine the applicability of the grounds for excluding criminal responsibility provided for in this Statute to the case before it.

3. At trial, the Court may consider a ground for excluding criminal responsibility other than those referred to in paragraph 1 where such a ground is derived from applicable law as set forth in article 21. The procedures relating to the consideration of such a ground shall be provided for in the Rules of Procedure and Evidence.

Article 32

Mistake of fact or mistake of law

1. A mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime.

2. A mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility. A mistake of law may, however, be a ground for excluding criminal responsibility if it negates the mental element required by such a crime, or as provided for in article 33.

Article 33

Superior orders and prescription of law

1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:

(a) The person was under a legal obligation to obey orders of the Government or the superior in question;

- (b) The person did not know that the order was unlawful; and
- (c) The order was not manifestly unlawful.

2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.

PART 5. INVESTIGATION AND PROSECUTION

Article 53

Initiation of an investigation

1. The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether:

- (a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;
- (b) The case is or would be admissible under article 17; and
- (c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.

If the Prosecutor determines that there is no reasonable basis to proceed and his or her determination is based solely on subparagraph (c) above, he or she shall inform the Pre-Trial Chamber.

2. If, upon investigation, the Prosecutor concludes that there is not a sufficient basis for a prosecution because:

- (a) There is not a sufficient legal or factual basis to seek a warrant or summons under article 58;
- (b) The case is inadmissible under article 17; or
- (c) A prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime;

the Prosecutor shall inform the Pre-Trial Chamber and the State making a referral under article 14 or the Security Council in a case under article 13, paragraph (b), of his or her conclusion and the reasons for the conclusion.

3. (a) At the request of the State making a referral under article 14 or the Security Council under article 13, paragraph (b), the Pre-Trial Chamber may review a decision of the Prosecutor under paragraph 1 or 2 not to proceed and may request the Prosecutor to reconsider that decision.

(b) In addition, the Pre-Trial Chamber may, on its own initiative, review a decision of the

Prosecutor not to proceed if it is based solely on paragraph 1 (c) or 2 (c). In such a case, the decision of the Prosecutor shall be effective only if confirmed by the Pre-Trial Chamber.

4. The Prosecutor may, at any time, reconsider a decision whether to initiate an investigation or prosecution based on new facts or information.

Article 54

Duties and powers of the Prosecutor with respect to investigations

1. The Prosecutor shall:

- (a) In order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally;
- (b) Take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court, and in doing so, respect the interests and personal circumstances of victims and witnesses, including age, gender as defined in article 7, paragraph 3, and health, and take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children; and
- (c) Fully respect the rights of persons arising under this Statute.

2. The Prosecutor may conduct investigations on the territory of a State:

- (a) In accordance with the provisions of Part 9; or
- (b) As authorized by the Pre-Trial Chamber under article 57, paragraph 3 (d).

3. The Prosecutor may:

- (a) Collect and examine evidence;
- (b) Request the presence of and question persons being investigated, victims and witnesses;
- (c) Seek the cooperation of any State or intergovernmental organization or arrangement in accordance with its respective competence and/or mandate;
- (d) Enter into such arrangements or agreements, not inconsistent with this Statute, as may be necessary to facilitate the cooperation of a State, intergovernmental organization or person;
- (e) Agree not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents; and
- (f) Take necessary measures, or request that necessary measures be taken, to ensure the confidentiality of information, the protection of any person or the preservation of evidence.

Article 55

Rights of persons during an investigation

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1. In respect of an investigation under this Statute, a person:

- (a) Shall not be compelled to incriminate himself or herself or to confess guilt;
- (b) Shall not be subjected to any form of coercion, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment or punishment;
- (c) Shall, if questioned in a language other than a language the person fully understands and speaks, have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness; and
- (d) Shall not be subjected to arbitrary arrest or detention, and shall not be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established in this Statute.

2. Where there are grounds to believe that a person has committed a crime within the jurisdiction of the Court and that person is about to be questioned either by the Prosecutor, or by national authorities pursuant to a request made under Part 9, that person shall also have the following rights of which he or she shall be informed prior to being questioned:

- (a) To be informed, prior to being questioned, that there are grounds to believe that he or she has committed a crime within the jurisdiction of the Court;
- (b) To remain silent, without such silence being a consideration in the determination of guilt or innocence;
- (c) To have legal assistance of the person's choosing, or, if the person does not have legal assistance, to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by the person in any such case if the person does not have sufficient means to pay for it; and
- (d) To be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel.

Article 56

Role of the Pre-Trial Chamber in relation to a unique investigative opportunity

1. (a) Where the Prosecutor considers an investigation to present a unique opportunity to take testimony or a statement from a witness or to examine, collect or test evidence, which may not be available subsequently for the purposes of a trial, the Prosecutor shall so inform the Pre-Trial Chamber.

(b) In that case, the Pre-Trial Chamber may, upon request of the Prosecutor, take such measures as may be necessary to ensure the efficiency and integrity of the proceedings and, in particular, to protect the rights of the defence.

(c) Unless the Pre-Trial Chamber orders otherwise, the Prosecutor shall provide the relevant information to the person who has been arrested or appeared in response to a summons in connection

with the investigation referred to in subparagraph (a), in order that he or she may be heard on the matter.

2. The measures referred to in paragraph 1 (b) may include:

- (a) Making recommendations or orders regarding procedures to be followed;
- (b) Directing that a record be made of the proceedings;
- (c) Appointing an expert to assist;
- (d) Authorizing counsel for a person who has been arrested, or appeared before the Court in response to a summons, to participate, or where there has not yet been such an arrest or appearance or counsel has not been designated, appointing another counsel to attend and represent the interests of the defence;
- (e) Naming one of its members or, if necessary, another available judge of the Pre-Trial or Trial Division to observe and make recommendations or orders regarding the collection and preservation of evidence and the questioning of persons;
- (f) Taking such other action as may be necessary to collect or preserve evidence.

3. (a) Where the Prosecutor has not sought measures pursuant to this article but the Pre-Trial Chamber considers that such measures are required to preserve evidence that it deems would be essential for the defence at trial, it shall consult with the Prosecutor as to whether there is good reason for the Prosecutor's failure to request the measures. If upon consultation, the Pre-Trial Chamber concludes that the Prosecutor's failure to request such measures is unjustified, the Pre-Trial Chamber may take such measures on its own initiative.

(b) A decision of the Pre-Trial Chamber to act on its own initiative under this paragraph may be appealed by the Prosecutor. The appeal shall be heard on an expedited basis.

4. The admissibility of evidence preserved or collected for trial pursuant to this article, or the record thereof, shall be governed at trial by article 69, and given such weight as determined by the Trial Chamber.

Article 57

Functions and powers of the Pre-Trial Chamber

1. Unless otherwise provided in this Statute, the Pre-Trial Chamber shall exercise its functions in accordance with the provisions of this article.

2. (a) Orders or rulings of the Pre-Trial Chamber issued under articles 15, 18, 19, 54, paragraph 2, 61, paragraph 7, and 72 must be concurred in by a majority of its judges.

(b) In all other cases, a single judge of the Pre-Trial Chamber may exercise the functions provided for in this Statute, unless otherwise provided for in the Rules of Procedure and Evidence or by a majority of the Pre-Trial Chamber.

3. In addition to its other functions under this Statute, the Pre-Trial Chamber may:

- (a) At the request of the Prosecutor, issue such orders and warrants as may be required for the purposes of an investigation;
- (b) Upon the request of a person who has been arrested or has appeared pursuant to a summons under article 58, issue such orders, including measures such as those described in article 56, or seek such cooperation pursuant to Part 9 as may be necessary to assist the person in the preparation of his or her defence;
- (c) Where necessary, provide for the protection and privacy of victims and witnesses, the preservation of evidence, the protection of persons who have been arrested or appeared in response to a summons, and the protection of national security information;
- (d) Authorize the Prosecutor to take specific investigative steps within the territory of a State Party without having secured the cooperation of that State under Part 9 if, whenever possible having regard to the views of the State concerned, the Pre-Trial Chamber has determined in that case that the State is clearly unable to execute a request for cooperation due to the unavailability of any authority or any component of its judicial system competent to execute the request for cooperation under Part 9.
- (e) Where a warrant of arrest or a summons has been issued under article 58, and having due regard to the strength of the evidence and the rights of the parties concerned, as provided for in this Statute and the Rules of Procedure and Evidence, seek the cooperation of States pursuant to article 93, paragraph 1 (k), to take protective measures for the purpose of forfeiture, in particular for the ultimate benefit of victims.

Article 58
Issuance by the Pre-Trial Chamber of a warrant of arrest or a summons to appear

1. At any time after the initiation of an investigation, the Pre-Trial Chamber shall, on the application of the Prosecutor, issue a warrant of arrest of a person if, having examined the application and the evidence or other information submitted by the Prosecutor, it is satisfied that:

- (a) There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court; and
- (b) The arrest of the person appears necessary:
 - (i) To ensure the person's appearance at trial,
 - (ii) To ensure that the person does not obstruct or endanger the investigation or the court proceedings, or
 - (iii) Where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances.

2. The application of the Prosecutor shall contain:

- (a) The name of the person and any other relevant identifying information;
- (b) A specific reference to the crimes within the jurisdiction of the Court which the person is alleged to have committed;
- (c) A concise statement of the facts which are alleged to constitute those crimes;
- (d) A summary of the evidence and any other information which establish reasonable grounds to believe that the person committed those crimes; and
- (e) The reason why the Prosecutor believes that the arrest of the person is necessary.

3. The warrant of arrest shall contain:

- (a) The name of the person and any other relevant identifying information;
- (b) A specific reference to the crimes within the jurisdiction of the Court for which the person's arrest is sought; and
- (c) A concise statement of the facts which are alleged to constitute those crimes.

4. The warrant of arrest shall remain in effect until otherwise ordered by the Court.

5. On the basis of the warrant of arrest, the Court may request the provisional arrest or the arrest and surrender of the person under Part 9.

6. The Prosecutor may request the Pre-Trial Chamber to amend the warrant of arrest by modifying or adding to the crimes specified therein. The Pre-Trial Chamber shall so amend the warrant if it is satisfied that there are reasonable grounds to believe that the person committed the modified or additional crimes.

7. As an alternative to seeking a warrant of arrest, the Prosecutor may submit an application requesting that the Pre-Trial Chamber issue a summons for the person to appear. If the Pre-Trial Chamber is satisfied that there are reasonable grounds to believe that the person committed the crime alleged and that a summons is sufficient to ensure the person's appearance, it shall issue the summons, with or without conditions restricting liberty (other than detention) if provided for by national law, for the person to appear. The summons shall contain:

- (a) The name of the person and any other relevant identifying information;
- (b) The specified date on which the person is to appear;
- (c) A specific reference to the crimes within the jurisdiction of the Court which the person is alleged to have committed; and
- (d) A concise statement of the facts which are alleged to constitute the crime.

The summons shall be served on the person.

Article 59
Arrest proceedings in the custodial State

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1. A State Party which has received a request for provisional arrest or for arrest and surrender shall immediately take steps to arrest the person in question in accordance with its laws and the provisions of Part 9.

2. A person arrested shall be brought promptly before the competent judicial authority in the custodial State which shall determine, in accordance with the law of that State, that:

- (a) The warrant applies to that person;
- (b) The person has been arrested in accordance with the proper process; and
- (c) The person's rights have been respected.

3. The person arrested shall have the right to apply to the competent authority in the custodial State for interim release pending surrender.

4. In reaching a decision on any such application, the competent authority in the custodial State shall consider whether, given the gravity of the alleged crimes, there are urgent and exceptional circumstances to justify interim release and whether necessary safeguards exist to ensure that the custodial State can fulfil its duty to surrender the person to the Court. It shall not be open to the competent authority of the custodial State to consider whether the warrant of arrest was properly issued in accordance with article 58, paragraph 1 (a) and (b).

5. The Pre-Trial Chamber shall be notified of any request for interim release and shall make recommendations to the competent authority in the custodial State. The competent authority in the custodial State shall give full consideration to such recommendations, including any recommendations on measures to prevent the escape of the person, before rendering its decision.

6. If the person is granted interim release, the Pre-Trial Chamber may request periodic reports on the status of the interim release.

7. Once ordered to be surrendered by the custodial State, the person shall be delivered to the Court as soon as possible.

Article 60

Initial proceedings before the Court

1. Upon the surrender of the person to the Court, or the person's appearance before the Court voluntarily or pursuant to a summons, the Pre-Trial Chamber shall satisfy itself that the person has been informed of the crimes which he or she is alleged to have committed, and of his or her rights under this Statute, including the right to apply for interim release pending trial.

2. A person subject to a warrant of arrest may apply for interim release pending trial. If the Pre-Trial Chamber is satisfied that the conditions set forth in article 58, paragraph 1, are met, the person shall continue to be detained. If it is not so satisfied, the Pre-Trial Chamber shall release the person, with or without conditions.

3. The Pre-Trial Chamber shall periodically review its ruling on the release or detention of the person, and may do so at any time on the request of the Prosecutor or the person. Upon such review, it may modify its ruling as to detention, release or conditions of release, if it is satisfied that changed circumstances so require.

4. The Pre-Trial Chamber shall ensure that a person is not detained for an unreasonable period prior to trial due to inexcusable delay by the Prosecutor. If such delay occurs, the Court shall consider releasing the person, with or without conditions.

5. If necessary, the Pre-Trial Chamber may issue a warrant of arrest to secure the presence of a person who has been released.

Article 61

Confirmation of the charges before trial

1. Subject to the provisions of paragraph 2, within a reasonable time after the person's surrender or voluntary appearance before the Court, the Pre-Trial Chamber shall hold a hearing to confirm the charges on which the Prosecutor intends to seek trial. The hearing shall be held in the presence of the Prosecutor and the person charged, as well as his or her counsel.

2. The Pre-Trial Chamber may, upon request of the Prosecutor or on its own motion, hold a hearing in the absence of the person charged to confirm the charges on which the Prosecutor intends to seek trial when the person has:

- (a) Waived his or her right to be present; or
- (b) Fled or cannot be found and all reasonable steps have been taken to secure his or her appearance before the Court and to inform the person of the charges and that a hearing to confirm those charges will be held.

In that case, the person shall be represented by counsel where the Pre-Trial Chamber determines that it is in the interests of justice.

3. Within a reasonable time before the hearing, the person shall:

- (a) Be provided with a copy of the document containing the charges on which the Prosecutor intends to bring the person to trial; and
- (b) Be informed of the evidence on which the Prosecutor intends to rely at the hearing.

The Pre-Trial Chamber may issue orders regarding the disclosure of information for the purposes of the hearing.

4. Before the hearing, the Prosecutor may continue the investigation and may amend or withdraw any charges. The person shall be given reasonable notice before the hearing of any amendment to or withdrawal of charges. In case of a

withdrawal of charges, the Prosecutor shall notify the Pre-Trial Chamber of the reasons for the withdrawal.

5. At the hearing, the Prosecutor shall support each charge with sufficient evidence to establish substantial grounds to believe that the person committed the crime charged. The Prosecutor may rely on documentary or summary evidence and need not call the witnesses expected to testify at the trial.

6. At the hearing, the person may:

- (a) Object to the charges;
- (b) Challenge the evidence presented by the Prosecutor; and
- (c) Present evidence.

7. The Pre-Trial Chamber shall, on the basis of the hearing, determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged. Based on its determination, the Pre-Trial Chamber shall:

- (a) Confirm those charges in relation to which it has determined that there is sufficient evidence, and commit the person to a Trial Chamber for trial on the charges as confirmed;
- (b) Decline to confirm those charges in relation to which it has determined that there is insufficient evidence;
- (c) Adjourn the hearing and request the Prosecutor to consider:
 - (i) Providing further evidence or conducting further investigation with respect to a particular charge; or
 - (ii) Amending a charge because the evidence submitted appears to establish a different crime within the jurisdiction of the Court.

8. Where the Pre-Trial Chamber declines to confirm a charge, the Prosecutor shall not be precluded from subsequently requesting its confirmation if the request is supported by additional evidence.

9. After the charges are confirmed and before the trial has begun, the Prosecutor may, with the permission of the Pre-Trial Chamber and after notice to the accused, amend the charges. If the Prosecutor seeks to add additional charges or to substitute more serious charges, a hearing under this article to confirm those charges must be held. After commencement of the trial, the Prosecutor may, with the permission of the Trial Chamber, withdraw the charges.

10. Any warrant previously issued shall cease to have effect with respect to any charges which have not been confirmed by the Pre-Trial Chamber or which have been withdrawn by the Prosecutor.

11. Once the charges have been confirmed in accordance with this article, the Presidency shall constitute a Trial Chamber which, subject to paragraph 9 and to article 64, paragraph 4, shall be responsible for the conduct of subsequent proceedings and may exercise any function of the Pre-Trial Chamber that is relevant and capable of application

in those proceedings.

PART 6. THE TRIAL

Article 62 Place of trial

Unless otherwise decided, the place of the trial shall be the seat of the Court.

Article 63 Trial in the presence of the accused

1. The accused shall be present during the trial.
2. If the accused, being present before the Court, continues to disrupt the trial, the Trial Chamber may remove the accused and shall make provision for him or her to observe the trial and instruct counsel from outside the courtroom, through the use of communications technology, if required. Such measures shall be taken only in exceptional circumstances after other reasonable alternatives have proved inadequate, and only for such duration as is strictly required.

Article 64 Functions and powers of the Trial Chamber

1. The functions and powers of the Trial Chamber set out in this article shall be exercised in accordance with this Statute and the Rules of Procedure and Evidence.
2. The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.
3. Upon assignment of a case for trial in accordance with this Statute, the Trial Chamber assigned to deal with the case shall:
 - (a) Confer with the parties and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings;
 - (b) Determine the language or languages to be used at trial; and
 - (c) Subject to any other relevant provisions of this Statute, provide for disclosure of documents or information not previously disclosed, sufficiently in advance of the commencement of the trial to enable adequate preparation for trial.
4. The Trial Chamber may, if necessary for its effective and fair functioning, refer preliminary issues to the Pre-Trial Chamber or, if necessary, to another available judge of the Pre-Trial Division.
5. Upon notice to the parties, the Trial Chamber may, as appropriate, direct that there be joinder or severance in respect of charges against more than one accused.

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6. In performing its functions prior to trial or during the course of a trial, the Trial Chamber may, as necessary:

- (a) Exercise any functions of the Pre-Trial Chamber referred to in article 61, paragraph 11;
- (b) Require the attendance and testimony of witnesses and production of documents and other evidence by obtaining, if necessary, the assistance of States as provided in this Statute;
- (c) Provide for the protection of confidential information;
- (d) Order the production of evidence in addition to that already collected prior to the trial or presented during the trial by the parties;
- (e) Provide for the protection of the accused, witnesses and victims; and
- (f) Rule on any other relevant matters.

7. The trial shall be held in public. The Trial Chamber may, however, determine that special circumstances require that certain proceedings be in closed session for the purposes set forth in article 68, or to protect confidential or sensitive information to be given in evidence.

8. (a) At the commencement of the trial, the Trial Chamber shall have read to the accused the charges previously confirmed by the Pre-Trial Chamber. The Trial Chamber shall satisfy itself that the accused understands the nature of the charges. It shall afford him or her the opportunity to make an admission of guilt in accordance with article 65 or to plead not guilty.

(b) At the trial, the presiding judge may give directions for the conduct of proceedings, including to ensure that they are conducted in a fair and impartial manner. Subject to any directions of the presiding judge, the parties may submit evidence in accordance with the provisions of this Statute.

9. The Trial Chamber shall have, inter alia, the power on application of a party or on its own motion to:

- (a) Rule on the admissibility or relevance of evidence; and
- (b) Take all necessary steps to maintain order in the course of a hearing.

10. The Trial Chamber shall ensure that a complete record of the trial, which accurately reflects the proceedings, is made and that it is maintained and preserved by the Registrar.

Article 65

Proceedings on an admission of guilt

1. Where the accused makes an admission of guilt pursuant to article 64, paragraph 8 (a), the Trial Chamber shall determine whether:

- (a) The accused understands the nature and consequences of the admission of guilt;

(b) The admission is voluntarily made by the accused after sufficient consultation with defence counsel; and

(c) The admission of guilt is supported by the facts of the case that are contained in:

- (i) The charges brought by the Prosecutor and admitted by the accused;
- (ii) Any materials presented by the Prosecutor which supplement the charges and which the accused accepts; and
- (iii) Any other evidence, such as the testimony of witnesses, presented by the Prosecutor or the accused.

2. Where the Trial Chamber is satisfied that the matters referred to in paragraph 1 are established, it shall consider the admission of guilt, together with any additional evidence presented, as establishing all the essential facts that are required to prove the crime to which the admission of guilt relates, and may convict the accused of that crime.

3. Where the Trial Chamber is not satisfied that the matters referred to in paragraph 1 are established, it shall consider the admission of guilt as not having been made, in which case it shall order that the trial be continued under the ordinary trial procedures provided by this Statute and may remit the case to another Trial Chamber.

4. Where the Trial Chamber is of the opinion that a more complete presentation of the facts of the case is required in the interests of justice, in particular the interests of the victims, the Trial Chamber may:

(a) Request the Prosecutor to present additional evidence, including the testimony of witnesses; or

(b) Order that the trial be continued under the ordinary trial procedures provided by this Statute, in which case it shall consider the admission of guilt as not having been made and may remit the case to another Trial Chamber.

5. Any discussions between the Prosecutor and the defence regarding modification of the charges, the admission of guilt or the penalty to be imposed shall not be binding on the Court.

Article 66

Presumption of innocence

1. Everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law.

2. The onus is on the Prosecutor to prove the guilt of the accused.

3. In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt.

Article 67

Rights of the accused

1. In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks;

(b) To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence;

(c) To be tried without undue delay;

(d) Subject to article 63, paragraph 2, to be present at the trial, to conduct the defence in person or through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her. The accused shall also be entitled to raise defences and to present other evidence admissible under this Statute;

(f) To have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings or documents presented to the Court are not in a language which the accused fully understands and speaks;

(g) Not to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence;

(h) To make an unsworn oral or written statement in his or her defence; and

(i) Not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal.

2. In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide.

Article 68

Protection of the victims and witnesses and their participation in the proceedings

1. The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime

involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

2. As an exception to the principle of public hearings provided for in article 67, the Chambers of the Court may, to protect victims and witnesses or an accused, conduct any part of the proceedings in camera or allow the presentation of evidence by electronic or other special means. In particular, such measures shall be implemented in the case of a victim of sexual violence or a child who is a victim or a witness, unless otherwise ordered by the Court, having regard to all the circumstances, particularly the views of the victim or witness.

3. Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.

4. The Victims and Witnesses Unit may advise the Prosecutor and the Court on appropriate protective measures, security arrangements, counselling and assistance as referred to in article 43, paragraph 6.

5. Where the disclosure of evidence or information pursuant to this Statute may lead to the grave endangerment of the security of a witness or his or her family, the Prosecutor may, for the purposes of any proceedings conducted prior to the commencement of the trial, withhold such evidence or information and instead submit a summary thereof. Such measures shall be exercised in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

6. A State may make an application for necessary measures to be taken in respect of the protection of its servants or agents and the protection of confidential or sensitive information.

Article 75

Reparations to victims

1. The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.

2. The Court may make an order directly against a convicted person specifying appropriate reparations

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to, or in respect of, victims, including restitution, compensation and rehabilitation.

Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79.

3. Before making an order under this article, the Court may invite and shall take account of representations from or on behalf of the convicted person, victims, other interested persons or interested States.

4. In exercising its power under this article, the Court may, after a person is convicted of a crime within the jurisdiction of the Court, determine whether, in order to give effect to an order which it may make under this article, it is necessary to seek measures under article 93, paragraph 1.

5. A State Party shall give effect to a decision under this article as if the provisions of article 109 were applicable to this article.

6. Nothing in this article shall be interpreted as prejudicing the rights of victims under national or international law.

Article 76 Sentencing

1. In the event of a conviction, the Trial Chamber shall consider the appropriate sentence to be imposed and shall take into account the evidence presented and submissions made during the trial that are relevant to the sentence.

2. Except where article 65 applies and before the completion of the trial, the Trial Chamber may on its own motion and shall, at the request of the Prosecutor or the accused, hold a further hearing to hear any additional evidence or submissions relevant to the sentence, in accordance with the Rules of Procedure and Evidence.

3. Where paragraph 2 applies, any representations under article 75 shall be heard during the further hearing referred to in paragraph 2 and, if necessary, during any additional hearing.

4. The sentence shall be pronounced in public and, wherever possible, in the presence of the accused.

PART 7. PENALTIES

Article 77 Applicable penalties

1. Subject to article 110, the Court may impose one of the following penalties on a person convicted of a crime referred to in article 5 of this Statute:

(a) Imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or

(b) A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.

2. In addition to imprisonment, the Court may order:

(a) A fine under the criteria provided for in the Rules of Procedure and Evidence;

(b) A forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties.

Article 78 Determination of the sentence

1. In determining the sentence, the Court shall, in accordance with the Rules of Procedure and Evidence, take into account such factors as the gravity of the crime and the individual circumstances of the convicted person.

2. In imposing a sentence of imprisonment, the Court shall deduct the time, if any, previously spent in detention in accordance with an order of the Court. The Court may deduct any time otherwise spent in detention in connection with conduct underlying the crime.

3. When a person has been convicted of more than one crime, the Court shall pronounce a sentence for each crime and a joint sentence specifying the total period of imprisonment. This period shall be no less than the highest individual sentence pronounced and shall not exceed 30 years imprisonment or a sentence of life imprisonment in conformity with article 77, paragraph 1 (b).

Article 79 Trust Fund

1. A Trust Fund shall be established by decision of the Assembly of States Parties for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims.

2. The Court may order money and other property collected through fines or forfeiture to be transferred, by order of the Court, to the Trust Fund.

3. The Trust Fund shall be managed according to criteria to be determined by the Assembly of States Parties.

Selected rules of the ICC Rules of Procedure and Evidence

Section III

Victims and witnesses

Subsection 1

Definition and general principle relating to victims

Rule 85

Definition of victims

For the purposes of the Statute and the Rules of Procedure and Evidence:

- (a) "Victims" means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court;
- (b) Victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.

Rule 86

General principle

A Chamber in making any direction or order, and other organs of the Court in performing their functions under the Statute or the Rules, shall take into account the needs of all victims and witnesses in accordance with article 68, in particular, children, elderly persons, persons with disabilities and victims of sexual or gender violence.

Rule 87

Protective measures

1. Upon the motion of the Prosecutor or the defence or upon the request of a witness or a victim or his or her legal representative, if any, or on its own motion, and after having consulted with the Victims and Witnesses Unit, as appropriate, a Chamber may order measures to protect a victim, a witness or another person at risk on account of testimony given by a witness pursuant to article 68, paragraphs 1 and 2. The Chamber shall seek to obtain, whenever possible, the consent of the person in respect of whom the protective measure is sought prior to ordering the protective measure.

2. A motion or request under sub-rule 1 shall be governed by rule 134, provided that:

- (a) Such a motion or request shall not be submitted ex parte;

(b) A request by a witness or by a victim or his or her legal representative, if any, shall be served on both the Prosecutor and the defence, each of whom shall have the opportunity to respond;

(c) A motion or request affecting a particular witness or a particular victim shall be served on that witness or victim or his or her legal representative, if any, in addition to the other party, each of whom shall have the opportunity to respond;

(d) When the Chamber proceeds on its own motion, notice and opportunity to respond shall be given to the Prosecutor and the defence, and to any witness or any victim or his or her legal representative, if any, who would be affected by such protective measure; and

(e) A motion or request may be filed under seal, and, if so filed, shall remain sealed until otherwise ordered by a Chamber. Responses to motions or requests filed under seal shall also be filed under seal.

3. A Chamber may, on a motion or request under sub-rule 1, hold a hearing, which shall be conducted in camera, to determine whether to order measures to prevent the release to the public or press and information agencies, of the identity or the location of a victim, a witness or other person at risk on account of testimony given by a witness by ordering, inter alia:

(a) That the name of the victim, witness or other person at risk on account of testimony given by a witness or any information which could lead to his or her identification, be expunged from the public records of the Chamber;

(b) That the Prosecutor, the defence or any other participant in the proceedings be prohibited from disclosing such information to a third party;

(c) That testimony be presented by electronic or other special means, including the use of technical means enabling the alteration of pictures or voice, the use of audio-visual technology, in particular videoconferencing and closed-circuit television, and the exclusive use of the sound media;

(d) That a pseudonym be used for a victim, a witness or other person at risk on account of testimony given by a witness; or

(e) That a Chamber conduct part of its proceedings in camera.

Rule 88

Special measures

1. Upon the motion of the Prosecutor or the defence, or upon the request of a witness or a victim or his or her legal representative, if any, or on its own motion, and after having consulted with the Victims

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and Witnesses Unit, as appropriate, a Chamber may, taking into account the views of the victim or witness, order special measures such as, but not limited to, measures to facilitate the testimony of a traumatized victim or witness, a child, an elderly person or a victim of sexual violence, pursuant to article 68, paragraphs 1 and 2. The Chamber shall seek to obtain, whenever possible, the consent of the person in respect of whom the special measure is sought prior to ordering that measure.

2. A Chamber may hold a hearing on a motion or a request under sub-rule 1, if necessary in camera or ex parte, to determine whether to order any such special measure, including but not limited to an order that a counsel, a legal representative, a psychologist or a family member be permitted to attend during the testimony of the victim or the witness.

3. For inter partes motions or requests filed under this rule, the provisions of rule 87, sub-rules 2 (b) to (d), shall apply mutatis mutandis.

4. A motion or request filed under this rule may be filed under seal, and if so filed shall remain sealed until otherwise ordered by a Chamber. Any responses to inter partes motions or requests filed under seal shall also be filed under seal.

5. Taking into consideration that violations of the privacy of a witness or victim may create risk to his or her security, a Chamber shall be vigilant in controlling the manner of questioning a witness or victim so as to avoid any harassment or intimidation, paying particular attention to attacks on victims of crimes of sexual violence.

Subsection 3

Participation of victims in the proceedings

Rule 89

Application for participation of victims in the proceedings

1. In order to present their views and concerns, victims shall make written application to the Registrar, who shall transmit the application to the relevant Chamber. Subject to the provisions of the Statute, in particular article 68, paragraph 1, the Registrar shall provide a copy of the application to the Prosecutor and the defence, who shall be entitled to reply within a time limit to be set by the Chamber. Subject to the provisions of sub-rule 2, the Chamber shall then specify the proceedings and manner in which participation is considered appropriate, which may include making opening and closing statements.

2. The Chamber, on its own initiative or on the application of the Prosecutor or the defence, may reject the application if it considers that the person is not a victim or that the criteria set forth in article 68, paragraph 3, are not otherwise fulfilled. A victim whose application has been rejected may file a new application later in the proceedings.

3. An application referred to in this rule may also be made by a person acting with the consent of the victim, or a person acting on behalf of a victim, in the case of a victim who is a child or, when necessary, a victim who is disabled.

4. Where there are a number of applications, the Chamber may consider the applications in such a manner as to ensure the effectiveness of the proceedings and may issue one decision.

Rule 90

Legal representatives of victims

1. A victim shall be free to choose a legal representative.

2. Where there are a number of victims, the Chamber may, for the purposes of ensuring the effectiveness of the proceedings, request the victims or particular groups of victims, if necessary with the assistance of the Registry, to choose a common legal representative or representatives. In facilitating the coordination of victim representation, the Registry may provide assistance, inter alia, by referring the victims to a list of counsel, maintained by the Registry, or suggesting one or more common legal representatives.

3. If the victims are unable to choose a common legal representative or representatives within a time limit that the Chamber may decide, the Chamber may request the Registrar to choose one or more common legal representatives.

4. The Chamber and the Registry shall take all reasonable steps to ensure that in the selection of common legal representatives, the distinct interests of the victims, particularly as provided in article 68, paragraph 1, are represented and that any conflict of interest is avoided.

5. A victim or group of victims who lack the necessary means to pay for a common legal representative chosen by the Court may receive assistance from the Registry, including, as appropriate, financial assistance.

6. A legal representative of a victim or victims shall have the qualifications set forth in rule 22, sub-rule 1.

Rule 91

Participation of legal representatives in the proceedings

1. A Chamber may modify a previous ruling under rule 89.
2. A legal representative of a victim shall be entitled to attend and participate in the proceedings in accordance with the terms of the ruling of the Chamber and any modification thereof given under rules 89 and 90. This shall include participation in hearings unless, in the circumstances of the case, the Chamber concerned is of the view that the representative's intervention should be confined to written observations or submissions. The Prosecutor and the defence shall be allowed to reply to any oral or written observation by the legal representative for victims.
3. (a) When a legal representative attends and participates in accordance with this rule, and wishes to question a witness, including questioning under rules 67 and 68, an expert or the accused, the legal representative must make application to the Chamber. The Chamber may require the legal representative to provide a written note of the questions and in that case the questions shall be communicated to the Prosecutor and, if appropriate, the defence, who shall be allowed to make observations within a time limit set by the Chamber.
(b) The Chamber shall then issue a ruling on the request, taking into account the stage of the proceedings, the rights of the accused, the interests of witnesses, the need for a fair, impartial and expeditious trial and in order to give effect to article 68, paragraph 3. The ruling may include directions on the manner and order of the questions and the production of documents in accordance with the powers of the Chamber under article 64. The Chamber may, if it considers it appropriate, put the question to the witness, expert or accused on behalf of the victim's legal representative.
4. For a hearing limited to reparations under article 75, the restrictions on questioning by the legal representative set forth in sub-rule 2 shall not apply. In that case, the legal representative may, with the permission of the Chamber concerned, question witnesses, experts and the person concerned.

Rule 92

Notification to victims and their legal representatives

1. This rule on notification to victims and their legal representatives shall apply to all proceedings before the Court, except in proceedings provided for in Part 2.
2. In order to allow victims to apply for participation in the proceedings in accordance with rule 89, the Court shall notify victims concerning the decision of the Prosecutor not to initiate an investigation or not to prosecute pursuant to article 53. Such a notification shall be given to victims or their legal representatives who have already participated in the proceedings or, as far as possible, to those who have communicated with the Court in respect of the situation or case in question. The Chamber may order the measures outlined in sub-rule 8 if it considers it appropriate in the particular circumstances.
3. In order to allow victims to apply for participation in the proceedings in accordance with rule 89, the Court shall notify victims regarding its decision to hold a hearing to confirm charges pursuant to article 61. Such a notification shall be given to victims or their legal representatives who have already participated in the proceedings or, as far as possible, to those who have communicated with the Court in respect of the case in question.
4. When a notification for participation as provided for in sub-rules 2 and 3 has been given, any subsequent notification as referred to in sub-rules 5 and 6 shall only be provided to victims or their legal representatives who may participate in the proceedings in accordance with a ruling of the Chamber pursuant to rule 89 and any modification thereof.
5. In a manner consistent with the ruling made under rules 89 to 91, victims or their legal representatives participating in proceedings shall, in respect of those proceedings, be notified by the Registrar in a timely manner of:
 - (a) Proceedings before the Court, including the date of hearings and any postponements thereof, and the date of delivery of the decision;
 - (b) Requests, submissions, motions and other documents relating to such requests, submissions or motions.
6. Where victims or their legal representatives have participated in a certain stage of the proceedings, the Registrar shall notify them as soon as possible of the decisions of the Court in those proceedings.
7. Notifications as referred to in sub-rules 5 and 6 shall be in writing or, where written notification is not possible, in any other form as appropriate. The Registry shall keep a record of all notifications. Where

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necessary, the Registrar may seek the cooperation of States Parties in accordance with article 93, paragraph 1 (d) and (l).

8. For notification as referred to in sub-rule 3 and otherwise at the request of a Chamber, the Registrar shall take necessary measures to give adequate publicity to the proceedings. In doing so, the Registrar may seek, in accordance with Part 9, the cooperation of relevant States Parties, and seek the assistance of intergovernmental organizations.

Rule 93

Views of victims or their legal representatives

A Chamber may seek the views of victims or their legal representatives participating pursuant to rules 89 to 91 on any issue, inter alia, in relation to issues referred to in rules 107, 109, 125, 128, 136, 139 and 191. In addition, a Chamber may seek the views of other victims, as appropriate.

Rule 94

Procedure upon request

1. A victim's request for reparations under article 75 shall be made in writing and filed with the Registrar. It shall contain the following particulars:

- (a) The identity and address of the claimant;
- (b) A description of the injury, loss or harm;
- (c) The location and date of the incident and, to the extent possible, the identity of the person or persons the victim believes to be responsible for the injury, loss or harm;
- (d) Where restitution of assets, property or other tangible items is sought, a description of them;
- (e) Claims for compensation;
- (f) Claims for rehabilitation and other forms of remedy;
- (g) To the extent possible, any relevant supporting documentation, including names and addresses of witnesses.

2. At commencement of the trial and subject to any protective measures, the Court shall ask the Registrar to provide notification of the request to the person or persons named in the request or identified in the charges and, to the extent possible, to any interested persons or any interested States. Those notified shall file with the Registry any representation made under article 75, paragraph 3.

Rule 95

Procedure on the motion of the Court

1. In cases where the Court intends to proceed on its own motion pursuant to article 75, paragraph 1, it shall ask the Registrar to provide notification of its intention to the person or persons against whom the Court is considering making a determination, and, to the extent possible, to victims, interested persons and interested States. Those notified shall file with the Registry any representation made under article 75, paragraph 3.

2. If, as a result of notification under sub-rule 1:

(a) A victim makes a request for reparations, that request will be determined as if it had been brought under rule 94;

(b) A victim requests that the Court does not make an order for reparations, the Court shall not proceed to make an individual order in respect of that victim.

Rule 96

Publication of reparation proceedings

1. Without prejudice to any other rules on notification of proceedings, the Registrar shall, insofar as practicable, notify the victims or their legal representatives and the person or persons concerned. The Registrar shall also, having regard to any information provided by the Prosecutor, take all the necessary measures to give adequate publicity of the reparation proceedings before the Court, to the extent possible, to other victims, interested persons and interested States.

2. In taking the measures described in sub-rule 1, the Court may seek, in accordance with Part 9, the cooperation of relevant States Parties, and seek the assistance of intergovernmental organizations in order to give publicity, as widely as possible and by all possible means, to the reparation proceedings before the Court.

Rule 97

Assessment of reparations

1. Taking into account the scope and extent of any damage, loss or injury, the Court may award reparations on an individualized basis or, where it deems it appropriate, on a collective basis or both.

2. At the request of victims or their legal representatives, or at the request of the convicted person, or on its own motion, the Court may appoint appropriate experts to assist it in determining the scope, extent of any damage, loss and injury to, or in respect of victims and to suggest various options concerning the appropriate types and modalities of reparations. The Court shall invite, as appropriate, victims or their legal representatives, the convicted

person as well as interested persons and interested States to make observations on the reports of the experts.

3. In all cases, the Court shall respect the rights of victims and the convicted person.

Rule 98

Trust Fund

1. Individual awards for reparations shall be made directly against a convicted person.

2. The Court may order that an award for reparations against a convicted person be deposited with the Trust Fund where at the time of making the order it is impossible or impracticable to make individual awards directly to each victim. The award for reparations thus deposited in the Trust Fund shall be separated from other resources of the Trust Fund and shall be forwarded to each victim as soon as possible.

3. The Court may order that an award for reparations against a convicted person be made through the Trust Fund where the number of the victims and the scope, forms and modalities of reparations makes a collective award more appropriate.

4. Following consultations with interested States and the Trust Fund, the Court may order that an award for reparations be made through the Trust Fund to an intergovernmental, international or national organization approved by the Trust Fund.

5. Other resources of the Trust Fund may be used for the benefit of victims subject to the provisions of article 79.

Rule 99

Cooperation and protective measures for the purpose of forfeiture under articles 57, paragraph 3 (e), and 75, paragraph 4

1. The Pre-Trial Chamber, pursuant to article 57, paragraph 3 (e), or the Trial Chamber, pursuant to article 75, paragraph 4, may, on its own motion or on the application of the Prosecutor or at the request of the victims or their legal representatives who have made a request for reparations or who have given a written undertaking to do so, determine whether measures should be requested.

2. Notice is not required unless the Court determines, in the particular circumstances of the case, that notification could not jeopardize the effectiveness of the measures requested. In the latter case, the Registrar shall provide notification of the

proceedings to the person against whom a request is made and so far as is possible to any interested persons or interested States.

3. If an order is made without prior notification, the relevant Chamber shall request the Registrar, as soon as is consistent with the effectiveness of the measures requested, to notify those against whom a request is made and, to the extent possible, to any interested persons or any interested States and invite them to make observations as to whether the order should be revoked or otherwise modified.

4. The Court may make orders as to the timing and conduct of any proceedings necessary to determine these issues.

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GLOSSARY

Assembly of States Parties = Forum of states parties, i.e. States that have ratified or acceded to the Rome Statute. Responsible for overseeing the management of the Court and for any issues relating to changes to the founding treaty. The Assembly comes together at least once a year and makes decisions on a range of issues, such as adoption of legal texts, approval of budget and election of Judges.

Case = proceedings before the ICC that concern specific crimes and individual accused person(s), initiated by the issuance of an arrest warrant

Chambers = judicial organ of the Court. Include the Pre-Trial Chambers, Trial Chambers and the Appeals Chamber, composed of independent judges who are nationals of the States parties.

Commission of Inquiry on Darfur = set up by the UN Security Council in September 2004 and composed of international experts, mandated to “investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties, to determine also whether or not acts of genocide have occurred, and to identify the perpetrators of such violations with a view to ensuring that those responsible will be held accountable.” Published its final report in January 2005, in which it found that serious violations amounting to war crimes and crimes against humanity have been committed and recommended that the UN Security Council refer the situation in Darfur to the Prosecutor of the ICC.

Complementarity = principle that the ICC will only investigate and prosecute cases where the state concerned is unable or unwilling genuinely to do so itself.

Counsel = a lawyer who may represent a victim or an accused in proceedings before the Court. Must have a minimum of ten years experience as a criminal lawyer, judge or prosecutor and be fluent in the working languages of the Court, i.e. English or French.

Immunity = principle that bars proceedings and thereby exempt particular persons, such as officials, from being subject to criminal or civil, or any kind of proceedings, resulting in impunity.

Impunity = means the impossibility, de jure or de facto, of bringing the perpetrators of violence to account-whether in criminal, civil, administrative or disciplinary proceedings- since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty,

sentenced to appropriate penalties, and to making reparations to their victims.

International crimes = as used in this Guide, crimes that can be prosecuted and tried before the ICC, namely genocide, war crimes and crimes against humanity.

Investigations = part of the proceedings in which the Prosecutor, following a decision to initiate investigations, seeks to establish the truth through collecting and examining evidence with a view to assessing whether there is criminal responsibility in respect of the situation under investigation.

Jurisdiction = the power of the court to hear cases relating to specific crimes. Divided into material (what crimes = genocide, crimes against humanity and war crimes), territorial (States parties, referral, voluntary submission) and temporal jurisdiction (after 1 July 2002).

Office of the Prosecutor = independent organ of the Court responsible for examining referrals and communications, conducting investigations into international crimes and prosecuting individuals accused of such crimes before the Court.

Office of Public Counsel for Victims = independent office at the Court mandated to “provide support and assistance to the legal representative for victims and to victims, including, where appropriate, legal research and advice; and appearing before a Chamber in respect of specific issues.”

Presidency = responsible for the proper judicial administration of the Court, composed of three judges.

Proceedings = the stages of the ICC process, including preliminary investigations, pre-trial, trial and appeal.

Registry = organ of the ICC responsible for the general administration and service of the Court. Includes the Victims Participation and Reparation Section and the Victim and Witness Unit.

Reparation = measures taken to undo as much as possible the harm and injustice caused by a crime, including restitution, compensation and rehabilitation. A victim of an international crime falling within the jurisdiction of the ICC may apply for reparation, and the Court may order reparations, either to be made by the convicted perpetrator or through the Trust Fund.

Rome Statute = name of the treaty establishing the ICC and governing the work of the Court.

Rules of Procedure and Evidence = a set of rules adopted by the Assembly of States Parties that specify the provisions contained in the Rome Statute in relation to the procedures of the Court and evidentiary matters.

Trust Fund for Victims = a body established by decision of the Assembly of States Parties for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims.

UN Security Council Referral = a decision made by the UN Security Council under Chapter VII of the UN Charter, having binding force, by which the Council requests the Prosecutor of the ICC to examine a particular situation. The referral of the situation in Darfur to the ICC has been the first of its kind.

Victim = natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court; victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.

Witness = a person giving evidence in court proceedings. He or she is commonly called by the Prosecutor or the defence but a victim or the Court may also call witnesses to testify.

Victims Participation and Reparations Section = a section of the Court at the Registry that assists victims in relation to their applications for participation in proceedings or for reparations, or both. It also assists victims in obtaining legal advice and organising their legal representation.

Victims and Witness Unit = unit within the Registry which provides protective measures and security arrangements, counselling and other assistance for victims, victims who appear before the Court, and others who are at risk on account of testimony given by such witness. This includes witness protection programmes.

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KEY CONTACT INFORMATION FOR THE INTERNATIONAL CRIMINAL COURT

General contact details for the International Criminal Court

Postal Address:

Po Box 19519

2500 CM, The Hague

The Netherlands

Tel: + 31 (0)70 515 8515 (Switchboard)

Fax: +31 (0)70 515 8555

** If a victim of a crime, a witness, a lawyer or anyone else wants to contact an office, unit or section at the Court whose number is not listed below, it is best to call this number and ask the operator to be put through to the relevant office

Office of the Prosecutor, JCCD

Email: otp.informationdesk@icc-cpi.int

Victims Participation and Reparations Section
International Criminal Court

Email: yprsapplications@icc-cpi.int

vprs@icc-cpi.int

Trust Fund for Victims: trust.fund@icc-cpi.int

Office of Public Counsel for Victims

Tel.: + 31 (0)70 515 81539084

Fax: + 31 (0)70 515 8855

Email: OPCV@icc-cpi.int

Outreach Unit

Public Information and Documentation Section
Registry

International Criminal Court

Telephone +31 (0)70 515-8514

Fax: +31 (0)70 515-8555

Mobile +31 (0)625221177

Email address: iccoutreach@icc-cpi.int

LINKS TO KEY DOCUMENTS

ICC DOCUMENTS

GENERAL

Rome Statute of the International Criminal Court
http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_120704-EN.pdf

Elements of Crimes
[http://www.icc-cpi.int/library/about/officialjournal/basicdocuments/elements\(e\).html?page=library/officialjournal/basicdocuments/elements\(e\)](http://www.icc-cpi.int/library/about/officialjournal/basicdocuments/elements(e).html?page=library/officialjournal/basicdocuments/elements(e))

Rules of Procedure and Evidence
http://www.icc-cpi.int/library/about/officialjournal/Rules_of_Proc_and_Evid_070704-EN.pdf

Regulations of the Court
http://www.icc-cpi.int/library/about/officialjournal/Regulations_of_the_Court_170604-EN.pdf

Regulations of the Registry
http://www.icc-cpi.int/library/about/officialjournal/ICC-BD_03-01-06-Rev1_English.pdf

FOR LAWYERS

List of counsel before the ICC
http://www.icc-cpi.int/library/defence/Defense_Counsel_List_English.pdf

Application form to become counsel (victims and defence)
http://www.icc-cpi.int/library/defence/Counsel_Form_en.doc

Certificate of good standing for counsel
http://www.icc-cpi.int/library/defence/Counsel_Certificate_en.pdf

Application form to become assistant to counsel
http://www.icc-cpi.int/library/defence/Counsel-Assistant_Form_en.doc

Certificate of good standing for assistant to counsel
http://www.icc-cpi.int/library/defence/Counsel-Assistant_Certificate_en.pdf

FOR VICTIMS

Participation

Application form to participate in proceedings before the ICC for individual victims and persons acting on their behalf
http://www.icc-cpi.int/library/victims/Form-Participation-1_en.pdf

Application form to participate in proceedings before the ICC for victims which are organisations or institutions
http://www.icc-cpi.int/library/victims/Form-Participation-2_en.pdf

Booklet, Victims before the International Criminal Court, A Guide for the Participation of Victims in the Proceedings of the Court
http://www.icc-cpi.int/library/victims/VPRS_Booklet_En.pdf

Reparation

Standard application form for reparations before the International Criminal Court for individual victims and persons acting on their behalf
http://www.icc-cpi.int/library/victims/Form-Reparation-1_en.pdf

Standard application form for reparations before the International Criminal Court for victims which are organisations or institutions
http://www.icc-cpi.int/library/victims/Form-Reparation-2_en.pdf

UN DOCUMENTS

UN Security Council resolutions
<http://www.un.org/documents/scres.htm>

Report of the International Commission of Inquiry on Darfur
<http://www.ohchr.org/english/docs/darfurreport.doc>

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USEFUL WEBSITES

Official Websites

International Criminal Court www.icc-cpi.int

United Nations Mission in Sudan www.unmis.org

United Nations www.un.org

Office of the High Commissioner on Human Rights
www.ohchr.org

African Union and Darfur <http://www.africa-union.org/DARFUR/homedar.htm>

African Commission on Human and Peoples' Rights
www.achpr.org

Non-Governmental Organisations

Coalition for the International Criminal Court
www.iccnw.org

Victims Rights Working Group www.vrwg.org

REDRESS www.redress.org

Sudan Organisation against Torture
www.soatsudan.org

International Federation for Human Rights
www.fidh.org

International Bar Association www.ibanet.org

Amnesty International www.amnesty.org

Human Rights Watch www.hrw.org

The Darfur Consortium (An African and International Society Action for Darfur)
www.darfurconsortium.org

Cairo Institute for Human Rights Studies
www.cihrs.org,
containing two studies by Kamal El-Jazouli in Arabic:

Sudan and the ICC
http://www.cihrs.org/Release/PDF/29_57200645017.pdf

Darfur: The Truth Revealed (on the Commission of Inquiry on Darfur)
http://www.cihrs.org/Release/PDF/27_56200693455.pdf