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Assuming That The Principle Of Complementarity Applies To Security Council Referrals To The ICC, How Should The ICC Assess Whether The Sudan's Investigative And Prosecution Efforts Meet The Complementarity Principle?

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CASE WESTERN RESERVE UNIVERSITY SCHOOL OF LAW
INTERNATIONAL WAR CRIMES RESEARCH LAB

MEMORANDUM FOR THE
INTERNATIONAL CRIMINAL COURT

ISSUE:

ASSUMING THAT THE PRINCIPLE OF COMPLEMENTARITY APPLIES TO SECURITY
COUNCIL REFERRALS TO THE ICC, HOW SHOULD THE ICC ASSESS WHETHER THE
SUDAN'S INVESTIGATIVE AND PROSECUTION EFFORTS MEET THE
COMPLEMENTARITY PRINCIPLE?

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I. INTRODUCTION AND SUMMARY OF CONCLUSIONS

A. Issue.*

Assuming that the complementarity principle applies to Security Council referrals to the International Criminal Court (“ICC”), the purpose of this memorandum is to examine whether the efforts of the Government of Sudan to investigate and prosecute those accused of committing crimes in Darfur between July 1, 2002, and the present day are sufficient to render the case inadmissible to the ICC for prosecution under the principle of complementarity established in Article 17 of the Rome Statute of the ICC (“Rome Statute”).

B. Summary of Conclusions.

1. The limited evidence available suggests that the Government of Sudan is unwilling to genuinely prosecute individuals for the grave international crimes that were committed in Darfur.

Article 17(2) of the Rome Statute discusses three situations in which a State should be deemed genuinely “unwilling” to investigate or prosecute a case. In particular, “unwillingness” exists if any of the following situations are present: (1) the proceedings were or are being undertaken or a national decision not to prosecute was made with the purpose of shielding the accused from criminal responsibility for crimes within the ICC’s jurisdiction; (2) there was an unjustified delay in the proceedings that is inconsistent with an intent to bring the accused to justice; or, (3) the proceedings are not being conducted independently or impartially or are being conducted in a manner that is inconsistent with an intent to bring the accused to justice.¹

Although there is a lack of detailed information about the manner in which trials are being held in the Sudanese courts, the limited information that is available suggests that attempts

* ISSUE: Assuming that the principle of complementarity applies to Security Council referrals to the ICC, how should the ICC assess whether the Sudan’s investigative and prosecution efforts meet the complementarity principle?

¹ Rome Statute of the International Criminal Court, *adopted* July 17, 1998, U.N. Doc. A/CONF.183/9 (*entered into force* July 1, 2002), Art. 17(2). [hereinafter Rome Statute] [Reproduced in the accompanying notebook at Tab 13].

are being made to shield some of the perpetrators of crimes from criminal responsibility and that the legal proceedings are not being conducted impartially or in a manner consistent with justice.

2. The Government of Sudan is unable to genuinely prosecute individuals for war crimes and crimes against humanity committed in Darfur.

Article 17(1)(a) of the Rome Statute states that a case is admissible to the ICC if a “State is unwilling or unable genuinely to carry out the investigation or prosecution.”² A State is considered “unable” to investigate or prosecute a case when any of the following three circumstances prevent the State from obtaining the accused, the necessary evidence or testimony, or from otherwise carrying out its proceedings: (1) a total collapse of the national judicial system; (2) a substantial collapse of the national judicial system; or, (3) unavailability of the national judicial system.³ There is no evidence to suggest that the Sudanese judicial system has totally or substantially collapsed. However, as it is currently structured, the judicial system cannot prosecute individuals for crimes of the type over which the ICC has jurisdiction because neither the courts nor the criminal laws are sufficient to prosecute individuals for grave international crimes. Therefore, the Sudanese judicial system is unavailable to those seeking to prosecute individuals for war crimes and crimes against humanity.

3. The situation in Darfur can also be evaluated according to the provisions of Articles 17(1)(b)-(d) to determine whether the case would be admissible to the ICC for prosecution.

Article 17(1)(b) of the Rome Statute states that the ICC must declare a case inadmissible where a State with jurisdiction over the case has decided not to prosecute the accused, unless the decision resulted from the State’s unwillingness or inability to genuinely prosecute.⁴ While there

² *Id.*, Art. 17(1)(a).

³ *Id.*, Art. 17(3).

⁴ *Id.*, Art. 17(1)(b).

are known instances of trials resulting in acquittals of the defendants, there are currently no known cases of the government investigating an individual and then declining to prosecute that person. One could argue that the Government's failure to prosecute higher-ranking Government officials or leaders in the Janjaweed or rebel groups, while continuing to prosecute low-ranking soldiers and civilians, indicates a disingenuous decision not to prosecute within the meaning of Article 17(1)(b). Despite the lack of strong evidence pertaining to this provision of the inadmissibility test, the disjunctive nature of Article 17 allows the Prosecutor to evaluate the Sudan's efforts to investigate and prosecute under the remaining provisions of the test.

For instance, Article 17(1)(c) of the Rome Statute prohibits the ICC from prosecuting an individual for conduct for which he or she has already been tried by the State.⁵ This memorandum will demonstrate that the crimes for which individuals are being prosecuted in the Sudan do not parallel the crimes for which the ICC would prosecute individuals. Therefore, Article 17(1)(c) would not preclude the ICC from prosecuting individuals, who have already been convicted of a domestic crime, for grave international crimes.

Article 17(1)(d) prohibits the ICC from prosecuting individuals for crimes that are not of sufficient gravity to justify further action from the Court.⁶ Investigations completed by the International Commission of Inquiry ("ICI"), the United Nations and other nongovernmental organizations demonstrate unequivocally that the conflict in Darfur is of sufficient gravity to justify action by the Court.

⁵ *Id.*, Art. 17(1)(c).

⁶ *Id.*, Art. 17(1)(d).

II. FACTUAL BACKGROUND

The current crisis in Darfur arose, in large part, from the decades-long civil war between Northern and Southern Sudan. Therefore, a brief explanation of the history of the Sudanese civil war is necessary to understand the situation in Darfur.

A. The Sudanese civil war.

Northern Sudan is predominantly composed of Arab Muslim tribes, while Southern Sudan is predominantly composed of Christian and animist African tribes.⁷ In 1983, as a result of the imposition of Shari'a law throughout the country and the Government's efforts to assume control over oil-rich areas in southern Sudan, a civil war began between the Government in the north and the Sudan People's Liberation Movement/Army ("SPLM/A") in the South.⁸ In 1989, a military coup brought to power the current President of the Sudan, General Omar Hassan El-Bashir.⁹ Due to the heavy influence upon the President of the National Islamic Front, the legal and judicial systems were altered to conform to its version of political Islam.¹⁰

The civil war cost more than 2 million people their lives and forcibly displaced 4.5 million people from their homes.¹¹ In 2002, the toll of the war and international pressure led to the initiation of peace talks between the two sides and a discussion about the future of the country.¹² On January 9, 2005, the two sides signed a Comprehensive Peace Agreement ("CPA")

⁷ *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General*, pursuant to S.C. Res. 1564, U.N. Doc. S/2005/60, 17 (Jan. 2005). [hereinafter ICI report] [Reproduced in the accompanying notebook at Tab 22].

⁸ *Id.*; see also Kent Benedict Gravelle, *Islamic Law in Sudan: A Comparative Analysis*, 5 ILSA J. Int'l & Comp. L. 1, 4 (Fall 1998). [Reproduced in the accompanying notebook at Tab 46].

⁹ ICI report at 18. [Reproduced in the accompanying notebook at Tab 22].

¹⁰ *Id.* at 19.

¹¹ *Id.*

¹² *Id.*

that officially ended the civil war.¹³ The CPA provides the processes for establishing an interim national constitution and eventually holding a referendum on the southern Sudan's right to self-determination. A national Interim Constitution was approved on July 9, 2005, and southern Sudan has begun to draft its own Constitution.¹⁴ Since the end of the civil war, the State has continued to implement measures to effectuate the re-structuring of the country.

B. Darfur.

The region of Darfur is divided into three states: North, South and West Darfur.¹⁵ Tribal politics are prevalent in the region and the issue of land has frequently been a source of conflict among sedentary African tribes and nomadic Arab tribes.¹⁶ Increased access to weapons, through contacts with Chad and Libya in particular, has further augmented inter-tribal conflicts.¹⁷ In response to the tribal conflicts and the North-South civil war, the major tribes in Darfur and some villages began to organize militias and defense groups.¹⁸ Although the Government attempted to mediate between the two sides, it proved ineffective at resolving the tension and, instead, began to be seen as the main source of the problems in Darfur.¹⁹

In 2001 and 2002, two rebel groups in Darfur, the Sudan Liberation Movement/Army ("SLM/A") and the Justice and Equality Movement ("JEM") began to organize against the central Government.²⁰ Members of these rebel groups were recruited from the local militias and

¹³ *Id.*

¹⁴ *National Assembly ratifies interim constitution*, SUDAN NEWS AGENCY (SUNA), July 6, 2005. [Reproduced in the accompanying notebook at Tab 58].

¹⁵ ICI report at 20. [Reproduced in the accompanying notebook at Tab 22].

¹⁶ *Id.* at 20, 22.

¹⁷ *Id.* at 22.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

village defense groups and were composed mainly of members of the African Fur, Massalit and Zaghawa tribes.²¹ Both groups claimed that the socio-economic and political marginalization of Darfur demanded a rebellion, with the goal of gaining more equal participation by all groups and regions of the Sudan in the central Government.²² The two groups first began their attacks in late 2002 and early 2003.²³ These activities consisted of attacks on local police stations and Government military installations.²⁴ As the Government's forces and attention were heavily focused on the civil war, it was incapable of effectively stopping the rebel groups. To combat the attacks, the Government called upon members of local tribes for assistance.²⁵ In response, several Arab nomadic tribes agreed to assist the Government. These new recruits became what was later called the Janjaweed, which is a traditional Darfurian term describing an "armed bandit or outlaw on a horse or camel."²⁶

In the more than two years since the conflict in Darfur began, almost 200,000 people have been killed, more than 2 million people have been internally displaced and there has been large-scale destruction of villages.²⁷ On April 8, 2004, the Government, the SLM/A and JEM signed a Humanitarian Ceasefire Agreement and, on May 28, 2004, the three groups signed an agreement on ceasefire modalities.²⁸ On November 9, 2004, the parties signed two Protocols, one

²¹ *Id.* at 23.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 23-24.

²⁶ *Id.* at 24.

²⁷ *Id.* at 3; *see also International Crisis Group, Darfur Rising: Sudan's New Crisis*, ICG Africa Report N^o76 at 1 (March 25, 2004). [hereinafter ICG report] [Reproduced in the accompanying notebook at Tab 56]; *see also Situation in Sudan's Darfur deteriorating sharply, says UN refugee agency chief*, U.N. NEWS CENTRE, Oct. 25, 2005. [Reproduced in the accompanying notebook at Tab 62].

²⁸ ICI report at 24. [Reproduced in the accompanying notebook at Tab 22].

on the improvement of the humanitarian situation and the second on the enhancement of the security situation in Darfur.²⁹ Negotiations have continued, although the peace has been rocky and punctuated with attacks on civilians and refugees by both sides.

On September 18, 2004, the U.N. Security Council passed Resolution 1564, which established the ICI. The ICI was charged with investigating reports of violations of international human rights and humanitarian law, determining whether acts of genocide had occurred and identifying the perpetrators of any violations.³⁰ The ICI issued a report on January 25, 2005, which concluded that war crimes and crimes against humanity had most likely occurred in Darfur but that genocide had not taken place.³¹ Significantly, the report included a list of 51 names of individuals determined to be responsible for violations of international human rights and humanitarian law as well.³²

The ICI determined that the mass killing of civilians; crimes of sexual violence; torture; forced displacement; abductions and enforced disappearances; arbitrary arrests and detentions; and persecution were sufficiently widespread and systematic as to constitute crimes against humanity. The ICI also determined that disproportionate attacks on civilians and large scale destruction of civilian villages by Government forces and the Janjaweed could constitute war crimes. Members of the SLM/A and JEM were also found to have violated international human rights and humanitarian law in ways that could amount to war crimes by murdering civilians and pillaging villages.³³

²⁹ *Id.*

³⁰ S.C. Res. 1564, U.N. SCOR, 5040th mtg, U.N. Doc. S/RES/1564, ¶ 12 (2004). [hereinafter Res. 1564] [Reproduced in the accompanying notebook at Tab 16].

³¹ ICI report at 4. [Reproduced in the accompanying notebook at Tab 22].

³² *Id.* at 161.

³³ *Id.* at 160.

The ICI also concluded that several Government officials and members of the Janjaweed were responsible for perpetrating or co-perpetrating international crimes;³⁴ participating in a joint criminal enterprise;³⁵ aiding and abetting international crimes;³⁶ and planning and ordering international crimes.³⁷ Government officials were also found to be responsible for knowingly failing to prevent or repress the perpetration of international crimes.³⁸ In addition, members of the rebel groups were found to be responsible for the perpetration or co-perpetration of international crimes;³⁹ participating in a joint criminal enterprise;⁴⁰ and failing to prevent or repress the commission of international crimes.⁴¹

The ICI recommended that the situation in Darfur be referred to the ICC for prosecution. Subsequently, on March 31, 2005, the U.N. Security Council adopted Resolution 1593, which referred the situation in Darfur to the ICC for investigation.⁴² In response, the Government of Sudan has stated repeatedly that it has the capability to prosecute individuals accused of

³⁴ *Id.* at 135 (defined as individually or jointly possessing the requisite *mens rea* and performing an action, or failing to perform an action, which is prohibited and criminalized).

³⁵ *Id.* at 138 (defined as acts in which there is a plurality of people involved in the enterprise, a common plan to commit an international crime exists, and the accused individuals participate in the execution of the plan).

³⁶ *Id.* at 139 (defined as possessing the requisite *mens rea* by knowingly providing practical assistance, encouragement or moral support to the principal perpetrator of the crime).

³⁷ *Id.* at 140-141 (“planning” is defined as devising, agreeing upon with others, preparing and arranging for the commission of a crime. “Ordering” is defined in terms of a superior-subordinate relationship, in which the superior gives orders, in no particular form, to the subordinate to execute a crime).

³⁸ *Id.* at 143 (defined in terms of “superior responsibility,” which arises when a person who exercises effective command, control or authority over the perpetrators knew (or should have known) or had information that crimes were being or had been committed, consciously disregarded such knowledge or information and failed to take the necessary action to prevent or repress the crimes).

³⁹ *Id.* at 136.

⁴⁰ *Id.* at 138.

⁴¹ *Id.* at 143.

⁴² S.C. Res. 1593, U.N. SCOR, 5158th mtg, U.N. Doc. S/RES/1593 (2005). [hereinafter Res. 1593] [Reproduced in the accompanying notebook at Tab 17].

committing crimes in Darfur.⁴³ The Government claims that the Sudan has a “functioning and competent legal system” that “guarantees beyond all doubt its ability and willingness” to prosecute the Darfur cases.⁴⁴

C. The Sudanese legal system.

The Sudan has been undergoing a period of transition as it implements the Comprehensive Peace Agreement. Since the publication of the ICI report in January 2005, an Interim Constitution has been created.⁴⁵ The Interim Constitution states that the judicial system will be composed of a Constitutional Court, a National Supreme Court, National Courts of Appeal and other national courts or tribunals that are deemed necessary and established by law.⁴⁶

Beginning in 2001, in response to the civil war and the conflict in Darfur, the Government created Special Courts, a Specialised Court and Special War Crimes Courts to hear cases. These Courts do not appear to have been altered by the Interim Constitution. Sudanese criminal laws also do not appear to have been affected or modified by the Interim Constitution. Consequently, the jurisdiction and procedures of the regular criminal courts and specially created Courts continue to be governed by the Criminal Act of 1991 (“Criminal Code”), the Criminal Procedure Act of 1991 and the Evidence Act of 1993.⁴⁷

⁴³ See *Sudan defends Darfur stance*, AL-JAZEERA, April 22, 2005 [Reproduced in the accompanying notebook at Tab 63]; *Sudan to try 162 over Darfur crimes*, AL-JAZEERA, June 14, 2005 [Reproduced in the accompanying notebook at Tab 73]; *U.N. Sudan Situation Report*, U.N. Mission in Sudan, 1-2 (June 9, 2005). [Reproduced in the accompanying notebook at Tab 28].

⁴⁴ Text of statement by Minister of Justice to 61st session of UN Commission on Human Rights, SUDAN NEWS AGENCY (SUNA), March 15, 2005. [Reproduced in the accompanying notebook at Tab 78].

⁴⁵ Please note that the final version of the Interim Constitution was approved on July 9, 2005, but has not yet been made available to the public. As a result, this memorandum will use the draft Interim Constitution in its analysis.

⁴⁶ SUDAN DRAFT INTERIM CONST., Art. 119, 124 (2005) [hereinafter Draft Interim Constitution] [Reproduced in the accompanying notebook at Tab 14]; see also Protocol between the Government of Sudan and the SPLM/A on Power Sharing, Art. 2.11.2 (*signed on* May 26, 2004). [hereinafter Protocol on Power Sharing] [Reproduced in the accompanying notebook at Tab 12].

⁴⁷ See the Judiciary Act, 1976, Act No. 55, Art. 7 (Sudan) [Reproduced in the accompanying notebook at Tab 9]; the Criminal Act of 1991, Art. 5 (Sudan) [hereinafter Criminal Code] [Reproduced in the accompanying notebook at Tab 6]; the Criminal Procedure Act of 1991, Art. 3 (Sudan) [hereinafter Criminal Procedure Act] [Reproduced in the accompanying notebook at Tab 7]; and the Evidence Act, 1993, Art. 3 (Sudan). [hereinafter Evidence Act] [Reproduced in the accompanying notebook at Tab 8].

Significantly, the Sudan is a party to the International Covenant on Civil and Political Rights (“ICCPR”), the Convention on the Rights of the Child (“CRC”) and the African Charter on Human and Peoples’ Rights (“African Charter”).⁴⁸ As a member of the League of Arab States, the Sudan is also a party to the Arab Charter on Human Rights.⁴⁹ In addition, the Sudan is a signatory to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment (“CAT”).⁵⁰ Although the Sudan has not ratified the CAT, as a signatory it is still obligated by international law not to violate the spirit of the treaty.⁵¹ All of these international agreements delineate the standards for a fair trial. The ICCPR, in particular, states that all accused individuals are entitled to “a fair and public hearing by a competent, independent and impartial tribunal” and defines international standards of due process.⁵² Under international law, the Sudan has an obligation not to act in contravention of any treaties to which it is a party.⁵³

⁴⁸ International Covenant on Civil and Political Rights, March 18, 1966, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 [hereinafter ICCPR] [Reproduced in the accompanying notebook at Tab 10]; Convention on the Rights of the Child, Aug. 3, 1990, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 [hereinafter CRC] [Reproduced in the accompanying notebook at Tab 5]; African Charter on Human and Peoples’ Rights, Feb. 18, 1986, OAU Doc. CAB/LEG/67/3 rev. 5, 21 L.L.M. 58. [hereinafter African Charter] [Reproduced in the accompanying notebook at Tab 1].

⁴⁹ Arab Charter on Human Rights, Council of the League of Arab States, reprinted in 18 Hum. Rts. L.J. 151 (*adopted* Sept. 15, 1994). [hereinafter Arab Charter] [Reproduced in the accompanying notebook at Tab 2].

⁵⁰ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment, June 4, 1986, G.A. res. 39/46, [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)]. [hereinafter CAT] [Reproduced in the accompanying notebook at Tab 4].

⁵¹ The Vienna Convention on the Law of Treaties, April 18, 1990, 1155 U.N.T.S. 331, 8 L.L.M. 679, Art. 2(1)(g), 12 and 18 (In particular, Article 18 states that “A State is obliged to refrain from acts which would defeat the object and purpose of the treaty when: (a) It has signed the treaty...”). [hereinafter Vienna Convention] [Reproduced in the accompanying notebook at Tab 15].

⁵² ICCPR, Art. 14. [Reproduced in the accompanying notebook at Tab 10].

⁵³ Vienna Convention, Art. 2(1)(g), 12, 18 and 26. [Reproduced in the accompanying notebook at Tab 15].

III. LEGAL DISCUSSION

A. The ICC's potential role in ensuring accountability for crimes committed in Darfur.

The ICC was established to prosecute individuals for genocide, war crimes, crimes against humanity and the crime of aggression.⁵⁴ The ICC only has jurisdiction over crimes committed after July 1, 2002, which is the date on which the Rome Statute entered into force.⁵⁵ The Rome Statute defines the test to be used when determining whether a case can be admitted to the ICC for prosecution.⁵⁶ Since the Court was designed to complement national criminal jurisdictions rather than assume primacy over them, when determining whether a case is admissible, the Court must first give deference to a State's judicial system.⁵⁷ If a State is capable of exercising jurisdiction over a case, then the ICC cannot assume jurisdiction.⁵⁸ Consequently, the drafters of the Rome Statute included an *inadmissibility* test, rather than an *admissibility* test, in Article 17 to recognize that it is the primary duty of the States to prosecute grave international crimes.⁵⁹

1. Criminal jurisdiction of the Court.

The ICC has jurisdiction over only the “most serious crimes” that concern the international community.⁶⁰ The Rome Statute defines the “most serious crimes” as comprising

⁵⁴ Rome Statute, Art. 5. [Reproduced in the accompanying notebook at Tab 13].

⁵⁵ *Id.* at Art. 11.

⁵⁶ *Id.* at Art. 17.

⁵⁷ *Id.* at Preamble, ¶ 10, and Art. 1.

⁵⁸ KRISTINA MISKOWIAK, *THE INTERNATIONAL CRIMINAL COURT: CONSENT, COMPLEMENTARITY AND COOPERATION*, 39 (DJØF Publishing, 2000). [Reproduced in the accompanying notebook at Tab 40].

⁵⁹ 1 *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY*, Antonio Cassese, Paola Gaeta, & John R.W.D. Jones eds., 673 (2002) [hereinafter *THE ROME STATUTE OF THE ICC*] [Reproduced in the accompanying notebook at Tab 42].

⁶⁰ Rome Statute, Art. 5(1). [Reproduced in the accompanying notebook at Tab 13].

genocide, crimes against humanity, war crimes and aggression.⁶¹ In Resolution 1593, which referred Darfur to the ICC, the Security Council referenced the portion of the ICI report that determined that crimes against humanity and war crimes had been committed in Darfur.⁶² Consequently, this portion of the memorandum will address those two categories of crimes.

a. Crimes against humanity.

Article 7 of the Rome Statute grants the ICC jurisdiction over crimes against humanity, which it defines as certain acts committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.⁶³ The Rome Statute defines crimes against humanity as including eleven specific crimes:

(1) Murder; (2) Extermination; (3) Enslavement; (4) Deportation or forcible transfer of population; (5) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (6) Torture; (7) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (8) 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; (9) Enforced disappearance of persons; (10) The crime of apartheid; (11) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.⁶⁴

The statute then goes on to define with greater precision each of the eleven crimes.⁶⁵ The central element of each of these crimes is that they must be part of a “widespread and systematic” attack on a *civilian* population. Thus, Article 7 does not encompass crimes committed against the Government of a State, such as the offense of waging war against a State.

⁶¹ *Id.*

⁶² Res. 1593. [Reproduced in the accompanying notebook at Tab 17].

⁶³ Rome Statute, Art. 7(1). [Reproduced in the accompanying notebook at Tab 13].

⁶⁴ *Id.*

⁶⁵ *Id.*, Art. 7(2).

In its report on Darfur, the ICI found that the Government and the Government-supported military forces and militia had committed various crimes against humanity. The ICI report concluded that the rebels had not committed any conclusive crimes against humanity.⁶⁶

b. War crimes.

Article 8 of the Rome Statute grants the ICC jurisdiction over war crimes, particularly when they were committed as “part of a plan or policy or as part of a large-scale commission of such crimes.”⁶⁷ War crimes are defined as “grave breaches” of the Geneva Conventions of August 12, 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

(i) Wilful killing; (ii) Torture or inhuman treatment, including biological experiments; (iii) Wilfully causing great suffering, or serious injury to body or health; (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; (v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power; (vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial; (vii) Unlawful deportation or transfer or unlawful confinement; (viii) Taking of hostages.⁶⁸

The statute also includes serious violations of the laws applicable to international armed conflicts, violations of international law committed against people not actively involved in non-international armed conflicts, and other violations of international law in non-international armed conflicts.⁶⁹

The ICI report concluded that Government forces, the Janjaweed and rebel groups had committed various war crimes over the duration of the conflict in Darfur.⁷⁰

⁶⁶ See pp. 7-8, *supra*.

⁶⁷ Rome Statute, Art. 8(1). [Reproduced in the accompanying notebook at Tab 13].

⁶⁸ *Id.*, Art. 8(2)(a).

⁶⁹ See Art. 8(2)(b)-(f) for in-depth descriptions of the acts that constitute war crimes under these circumstances.

⁷⁰ See pp. 7-8, *supra*.

2. Article 17 of the Rome Statute governs the evaluation of the inadmissibility of a case to the ICC.

The ICC was not designed to be an appellate court that would review the decisions of domestic courts.⁷¹ Consequently, Article 17 was drafted in such a way as to ensure that the Court would objectively investigate a State's unwillingness or inability to prosecute a case. To achieve this goal, the drafters of the Rome Statute chose to include the word "genuine" in the assessment of a State's unwillingness or inability to prosecute.⁷² A definition of "genuine" was not provided in the statute, however, which implies that the Court will have discretion as to how to interpret the genuineness of a State's efforts.⁷³ Article 17 also requires the Prosecutor to "give regard to the principles of due process recognized by international law" when assessing a State's unwillingness to prosecute.⁷⁴ This requirement has been interpreted to suggest that the quality of justice provided by a State must be assessed in terms of procedural and substantive fairness.⁷⁵

Article 17(1) defines the circumstances under which a case is inadmissible to the ICC for prosecution. If any of the following four elements apply to a case, the ICC cannot assume jurisdiction in the matter. The elements are as follows:

- (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;

⁷¹ THE ROME STATUTE OF THE ICC at 673. [Reproduced in the accompanying notebook at Tab 42].

⁷² *Id.* at 674.

⁷³ WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT, 67 (Cambridge University Press, 2001). [hereinafter SCHABAS]. [Reproduced in the accompanying notebook at Tab 43].

⁷⁴ Rome Statute, Art. 17(2). [Reproduced in the accompanying notebook at Tab 13].

⁷⁵ SCHABAS at 68. [Reproduced in the accompanying notebook at Tab 43].

(d) The case is not of sufficient gravity to justify further action by the Court.⁷⁶

The first element of inadmissibility is the most crucial, as it involves an evaluation of the genuineness of any efforts undertaken by a State to prosecute the individuals involved in a particular case or situation. For this reason, the Rome Statute provides greater definition as to what constitutes “unwillingness” or “inability” to prosecute.

To determine “unwillingness” to prosecute, the Rome Statute provides a test that contains three elements. The Court must consider, with regard to the recognized principles of due process, whether one or more of the following elements exist:

- (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.⁷⁷

If any of these elements exist in a particular case, then the Court can determine that the State is unwilling to genuinely prosecute individuals and, therefore, that a case is admissible to the ICC.

To determine the “inability” of a State to prosecute, the Court must consider whether:

[D]ue 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.⁷⁸

If the Court determines that the above test is met in a particular case, it can determine that a State is unable to genuinely prosecute individuals and it can assume jurisdiction over the case.

If neither the “unwillingness” test nor the “inability” test is satisfied, the Court can look to the remaining three elements of the standard for inadmissibility listed in Articles 17(1)(b)-(d)

⁷⁶ Rome Statute, Art. 17(1). [Reproduced in the accompanying notebook at Tab 13].

⁷⁷ *Id.*, Art. 17(2).

⁷⁸ *Id.*, Art. 17(3).

of the Rome Statute. If any of those elements are inapplicable to the case at hand, the Court may admit a case for prosecution.

3. Under Article 17, the Sudan is unwilling and unable to genuinely prosecute individuals for crimes committed in Darfur.

a. The Sudan is unwilling to genuinely prosecute individuals for crimes committed in Darfur.

Based upon the limited information that is available about the trials that have been held in Sudanese courts, it appears that the Government is unwilling to genuinely prosecute individuals for international crimes, such as war crimes and crimes against humanity.

(1) The legal proceedings may be intended to shield the individuals concerned from criminal responsibility for crimes that fall within the ICC's jurisdiction.

If investigations and/or trials appear to be conducted with the purpose of “shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court,” then the Prosecutor can decide that the State is unwilling to genuinely prosecute and the Court can assume jurisdiction over the case.⁷⁹ International legal scholars have suggested several factors to be considered when determining whether a State is shielding people from criminal responsibility. These factors include, but are not limited to, whether “sham proceedings” have taken place or whether there have been obvious departures from the State’s normal legal procedures.⁸⁰ As a corollary to evaluating whether a trial is a “sham proceeding,” the Prosecutor

⁷⁹ *Id.*, Art. 17(2)(a).

⁸⁰ THE ROME STATUTE OF THE ICC at 675 [Reproduced in the accompanying notebook at Tab 42]; *see also* Mauro Politi, *The Rome Statute of the ICC: Rays of Light and Some Shadows*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A CHALLENGE TO IMPUNITY, 15 (Mauro Politi & Giuseppe Nesi eds., 2001) [hereinafter Politi]. [Reproduced in the accompanying notebook at Tab 41].

can also evaluate whether the State appears to be “going through the motions” in order to claim that investigations and prosecutions are taking place.⁸¹

The Sudanese government has prosecuted and convicted individuals for various low-level crimes committed during the civil war and the conflict in Darfur. To do so, the Government created separate Courts to hear cases. These Courts have continued to operate since the end of the civil war and the conflict in Darfur. The little information that is known about the trials that have taken place in the Special Courts, the Specialised Court and the Special War Crimes Courts suggests that sham trials may be occurring and that the individuals who are truly responsible for the crimes against humanity and war crimes that were committed in Darfur are not being prosecuted. As stated earlier, the ICI determined that the Government, through its deployment of Sudanese military forces, and the Janjaweed were largely responsible for the death, displacement and destruction that occurred in Darfur. The prosecutions and convictions that have occurred in Darfur since the conflict began, however, do not reflect this finding.

In 2001, the Government issued a decree that established Special Courts in North, South and West Darfur to hear crimes against the State.⁸² The Special Courts were created in response to tribal clashes and the fear that, without such courts, tribes would resort to revenge against each other.⁸³ The Courts specifically hear charges of armed robbery, banditry, offenses against the State (such as violations of constitutional decrees and emergency regulations), possession of unlicensed firearms, public order disturbances and any other crimes that the Chief Justice or head

⁸¹ SCHABAS at 67. [Reproduced in the accompanying notebook at Tab 43].

⁸² U.S. Department of State, Country Report on Human Rights Practices – Sudan, 7 (2004). [hereinafter State Dept. Country Report] [Reproduced in the accompanying notebook at Tab 79].

⁸³ *Statement of Special Rapporteur of the Commission on Human Rights on the situation of human rights in the Sudan*, U.N. Commission on Human Rights, 59th Sess., Agenda Item 9, U.N. Doc. E/CN.4/2003/42, 16 (Jan. 2003). [Reproduced in the accompanying notebook at Tab 26].

of the Judiciary included in the Courts' jurisdiction.⁸⁴ The Special Courts are headed by a civilian judge sitting with two military judges, who are members of the police force and the army and are not required to have any legal training.⁸⁵ This Governmental delegation of judicial power to members of the State security forces calls into question the independence and impartiality of these Courts, particularly since many of the cases involve defendants accused of committing crimes against the State. The Special Courts originally heard cases pertaining to the civil war between Northern and Southern Sudan. When the conflict in Darfur began, however, the Special Courts also began to hear cases pertaining to that region.

In 2003, the Government issued a decree that converted the Special Court in South Darfur into a Specialised Court, which then assumed the functions and jurisdiction of the Special Courts and was presumably meant to focus specifically on crimes committed within Darfur.⁸⁶ The 2003 decree altered the structure of the Specialised Court in South Darfur so that members of the State security forces no longer sat in judgment of the defendants; instead, the Specialised Court is headed by one judge who sits alone.⁸⁷ The Special Courts in North and West Darfur remain as established by the 2001 decree.⁸⁸

In early 2005, in response to the debate as to whether to refer Darfur to the ICC for prosecution, the Sudanese government offered to prosecute individuals for crimes committed in

⁸⁴ ICI Report at 112 [Reproduced in the accompanying notebook at Tab 22]; *see also* State Dept. Country Report at 7. [Reproduced in the accompanying notebook at Tab 79].

⁸⁵ *Interim report of the Special Rapporteur of the Commission on Human Rights on the situation of human rights in the Sudan*, U.N. Doc. A/57/326, 9 (2002) [hereinafter Interim Report of the Special Rapporteur] [Reproduced in the accompanying notebook at Tab 18]; *see also Amnesty International*, Darfur: Incommunicado detentions, torture and special courts – Memorandum to the Sudanese government and the Sudanese Commission of Inquiry, AFR 54/058/2004, 6 (June 8, 2004). [hereinafter AI memorandum to the Sudanese government] [Reproduced in the accompanying notebook at Tab 49].

⁸⁶ ICI report at 112. [Reproduced in the accompanying notebook at Tab 22].

⁸⁷ AI memorandum to the Sudanese government at 7. [Reproduced in the accompanying notebook at Tab 49].

⁸⁸ *Id.* at 5.

the region.⁸⁹ After Resolution 1593 was passed in March 2005 referring Darfur to the ICC, the Government stated that it would create its own court system to investigate the alleged crimes.⁹⁰ The decree creating the Special War Crimes Courts in Darfur was issued approximately one week after the Prosecutor for the ICC announced in June that he was beginning investigations in Darfur.⁹¹ Although the Special Courts and the Specialised Court continue to operate, the Special War Crimes Courts are the Government's main avenue for prosecuting individuals for crimes committed in Darfur.

(a) Prosecutions in the Special Courts and the Specialised Court.

The Government has stated that it “has brought before the courts persons involved in violations of human rights [and that] [s]cores of such persons have already been arrested and tried.”⁹² The ICI and other non-governmental organizations have reported that hundreds of people have been tried and convicted on charges of armed robbery and possession of unlicensed weapons.⁹³ The information that is available suggests that the trials are being conducted in violation of international standards for fair trials.

⁸⁹ *Sudan offers to try Darfur war criminals*, SUDAN TRIB., Feb. 25, 2005 [Reproduced in the accompanying notebook at Tab 68]; *see also Sudanese govt will prosecute 164 people for rights abuses in Darfur*, SUDAN TRIB., March 29, 2005. [Reproduced in the accompanying notebook at Tab 75].

⁹⁰ *Sudan says view UN list of 51 Darfur war criminals as only a guide*, SUDAN TRIB. (AP), April 29, 2005. [Reproduced in the accompanying notebook at Tab 76].

⁹¹ Press Release, Embassy of the Republic of the Sudan in London, Sudan Darfur Criminal Court in Action (June 17, 2005) [Reproduced in the accompanying notebook at Tab 60]; *see also Sudan sets up court for Darfur crimes*, SUDAN TRIB. (AFP), June 11, 2005. [Reproduced in the accompanying notebook at Tab 72].

⁹² *Sudan defends Darfur stance*, AL-JAZEERA, April 22, 2005. [Reproduced in the accompanying notebook at Tab 63].

⁹³ *Amnesty International*, Darfur: No One To Complain To, AFR 54/138/2004, 39 (Dec. 2004) [hereinafter AI report, Darfur: No One To Complain To] [Reproduced in the accompanying notebook at Tab 48]; ICI report at 112. [Reproduced in the accompanying notebook at Tab 22].

In May 2002, fourteen prisoners charged with armed robbery were sentenced to death by hanging and crucifixion in the Special Court in Nyala, South Darfur.⁹⁴ It is alleged that the defendants were not represented by counsel during their trials; however, they later obtained lawyers who appealed their sentences to the Chief Justice for South Darfur.⁹⁵ The outcome of the appeals is not known. On July 17, 2002, the Special Court in Nyala, headed by a civil judge and two members of the armed forces, sentenced eighty-eight of ninety-six members of the Rizeigat tribe to either death by hanging or death by hanging and crucifixion.⁹⁶ The defendants were charged with armed robbery, murder and possession of weapons.⁹⁷ Two of the eighty-eight individuals sentenced to death were fourteen-year-old boys.⁹⁸ Allegedly, seven of the ninety-six defendants were acquitted and one person was sentenced to ten years in prison.⁹⁹

In July 2004, the Minister of Foreign Affairs stated that more than two hundred members of the Janjaweed had been tried and convicted. The Sudanese government later revised its statement to say that ten members of the Janjaweed had been convicted in South Darfur.¹⁰⁰ The Government gave no details about the crimes for which the men had been found guilty. Several men were shown on television who claimed to be the convicted members of the Janjaweed; in fact, they were men accused of armed robbery who had been detained in South Darfur for more than a year.¹⁰¹ In the end, only five individuals were tried, including one bank employee who

⁹⁴ Interim Report of the Special Rapporteur at 10. [Reproduced in the accompanying notebook at Tab 18].

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Amnesty International*, Sudan: Who Will Answer For the Crimes? AFR 54/006/2005, 3 (2005). [Reproduced in the accompanying notebook at Tab 51].

¹⁰¹ *Id.*

was convicted of embezzlement and given a fine.¹⁰² In a separate trial in October 2004, Mohammed Barbary Ahab El-Nabi, a leader in the Janjaweed militia, was sentenced to three years in jail and fined the equivalent of \$39,000 for arson and stealing cattle.¹⁰³ In March 2005, the Government stated that it had arrested fifteen members of the police, military and security forces for crimes including “rape, killing, burning and other things.”¹⁰⁴ No further information has been obtained as to whether the defendants were brought to trial or the outcome of the trials.

It appears that the Special Courts and the Specialised Court are prosecuting individuals for low-level crimes committed on an individual scale, such as arson, armed robbery and possession of unlicensed weapons. These crimes are not within the purview of the ICC, which is designed to address crimes committed on a much larger scale. The courts also seem to be prosecuting individuals for offenses against the State, including undermining the constitutional system, waging war against the State, and abetment of mutiny.¹⁰⁵ These are not offenses that fall under the category of crimes against humanity or war crimes;¹⁰⁶ thus, they are not within the purview of the ICC’s jurisdiction. In addition, these courts utilize the Criminal Code, the Criminal Procedure Act, the Law of Evidence and the National Security Law when hearing cases and imposing judgments. As demonstrated below, these laws significantly violate international requirements for a fair trial.

¹⁰² *Id.*

¹⁰³ *Sudanese govt will prosecute 164 people for rights abuses in Darfur*, SUDAN TRIB. (AP), March 29, 2005. [Reproduced in the accompanying notebook at Tab 75].

¹⁰⁴ *Sudan says arrests 15 officials for Darfur crimes*, SUDAN TRIB. (REUTERS), March 28, 2005 [Reproduced in the accompanying notebook at Tab 71]; *Sudan makes first arrests for Darfur crimes*, SUDAN TRIB. (AP), March 28, 2005. [Reproduced in the accompanying notebook at Tab 67].

¹⁰⁵ *Sudan Organization Against Torture*, Newsletter, Issue No. 49, 13-14 (May-June 2005). [hereinafter SOAT newsletter] [Reproduced in the accompanying notebook at Tab 70].

¹⁰⁶ Rome Statute, Art. 7 and 8. [Reproduced in the accompanying notebook at Tab 13].

(b) Prosecutions in the Special War Crimes Courts for Darfur.

The Government created a special commission to investigate crimes that had occurred in Darfur, such as rape, human rights violations, crimes against humanity and war crimes.¹⁰⁷ Shortly after the commission was created, the Government announced that it intended to prosecute 164 individuals for crimes committed in Darfur.¹⁰⁸ This number has wavered over time but has remained around 160.¹⁰⁹ In June 2005, the Special War Crimes Courts were created specifically to prosecute “alleged war criminals.”¹¹⁰ The cases that come before the Special War Crimes Courts are to be cases of “gross abuses of human rights,”¹¹¹ which Chief Justice Jalal Al-Deen Mohamed Osman later defined as consisting of “violation of honour, murder and looting or property crimes committed in Darfur.”¹¹² Each of the three states in Darfur has its own panel of judges and each panel of judges has jurisdiction over all cases related to alleged war crimes in Darfur.¹¹³

¹⁰⁷ *Sudan says arrests 15 officials for Darfur crimes*, SUDAN TRIB. (REUTERS), March 28, 2005. [Reproduced in the accompanying notebook at Tab 71].

¹⁰⁸ *Sudanese govt will prosecute 164 people for rights abuses in Darfur*, SUDAN TRIB. (AP), March 29, 2005. [Reproduced in the accompanying notebook at Tab 75].

¹⁰⁹ *Sudan opens special war crimes court*, ASSOC. PRESS, June 19, 2005 (which states that 160 suspects have been identified) [Reproduced in the accompanying notebook at Tab 69]; *Sudan to try 162 over Darfur crimes*, AL-JAZEERA, June 14, 2005. [Reproduced in the accompanying notebook at Tab 73].

¹¹⁰ *U.N. Sudan Situation Report*, U.N. Mission in Sudan, 2 (June 12, 2005). [Reproduced in the accompanying notebook at Tab 29].

¹¹¹ Press Release, Embassy of the Republic of the Sudan in London, Sudan Darfur Criminal Court in Action (June 17, 2005) [Reproduced in the accompanying notebook at Tab 60]; *see also Sudan to investigate Darfur crimes*, AL-JAZEERA, June 12, 2005. [Reproduced in the accompanying notebook at Tab 66].

¹¹² *Sudan sets up court for Darfur crimes*, SUDAN TRIBUNE (AFP), June 11, 2005. [Reproduced in the accompanying notebook at Tab 72].

¹¹³ *Sudanese Darfur crimes court to hold first hearing Saturday*, SUDAN TRIB. (AFP), June 16, 2005. [Reproduced in the accompanying notebook at Tab 74].

The first case in Nyala, South Darfur, was heard in June. The case involved four defendants, including a minor who is eleven years old, charged with attempted armed robbery.¹¹⁴ The outcome of the case is unknown. The first hearing in El Fasher, North Darfur, began on July 5, 2005.¹¹⁵ The defendants were a lieutenant and a corporal, both members of the Sudan Armed Forces Military Intelligence Branch, who were accused of two crimes: the unlawful killing of a male minor who was being held in detention and causing injury to another male minor. Both defendants were represented by military legal advisors.¹¹⁶ On August 15, 2005, both men were convicted of murder and joint acts without criminal conspiracy in the death while in detention of the male minor.¹¹⁷ Sentencing was scheduled to take place on September 24, 2005; however, information is not available as to the sentence, if any, that was imposed by the Court. According to the Criminal Code, the two men could be sentenced to death by retribution or, if retribution is not imposed, a prison term of no more than ten years without prejudice to the right of *dia*.¹¹⁸ Retribution is punishment by inflicting the same act on the offender that he committed against his victim.¹¹⁹

¹¹⁴ *U.N. Sudan Situation Report*, U.N. Mission in Sudan, 3 (June 23, 2005). [Reproduced in the accompanying notebook at Tab 30].

¹¹⁵ *U.N. Sudan Situation Report*, U.N. Mission in Sudan, 3 (July 7, 2005). [Reproduced in the accompanying notebook at Tab 31].

¹¹⁶ *Id.*

¹¹⁷ *Monthly Report of the Secretary-General on Darfur*, pursuant to S.C. Res. 1556, 1564, 1574 and 1590, U.N. Doc. S/2005/592, 2 (Sept. 2005).[hereinafter Sec. Gen. Sept. report] [Reproduced in the accompanying notebook at Tab 20].

¹¹⁸ Criminal Code, Art. 130(2). Under Art. 22, a conviction of committing a joint act without criminal conspiracy means that both men shall be held responsible for the offense of murder and shall be punished with penalty proscribed for that offense. Art. 42 of the Criminal Code defines *dia* as blood money, or “one hundred camels of different ages or its equivalent value in money.” *Dia* multiplies by the number of victims and is to be borne equally by offenders if they participated in a criminal conspiracy or, in all other cases, by each according to his participation in the offense. [Reproduced in the accompanying notebook at Tab 6].

¹¹⁹ *Id.*, Art. 28(1). The right to retribution is reserved for the victim but can then vest in his relatives.

Two other cases involving charges against civilians, including a minor, of rape, armed robbery and illegal possession of firearms were brought before the El Fasher Court in August.¹²⁰ The outcomes of these two cases are unknown. According to the Criminal Code, a conviction of rape carries a sentence of 100 lashes and imprisonment for no more than ten years. If the rape constitutes adultery or homosexuality, however, the punishment is death.¹²¹ Armed robbery is punishable by death under the Criminal Code, if the act results in murder or rape.¹²² If the armed robbery resulted in grievous hurt or the robbery of property equivalent to a certain value, then the punishment is amputation of the right hand and left foot.¹²³ In all other cases, the punishment is no more than seven years in exile.¹²⁴ There is no specific offense labeled “illegal possession of weapons” in the Criminal Code. Since the defendants are civilians, it is possible that the Court could charge them with illegal possession of weapons in the context of waging war against the State (an Article 51 crime), which would carry a sentence of death, life imprisonment, imprisonment for a lesser period of time or the forfeiture of property.¹²⁵

On June 18, 2005, ten members of the Sudanese army and Popular Defence Forces were brought to trial in Nyala, South Darfur, on charges of rape and armed robbery.¹²⁶ On August 27, 2005, the Court acquitted all ten men of the charges. The presiding judge said that the reason for the acquittals was that the prosecution’s witnesses did not provide clear evidence but the defense

¹²⁰ Monthly report of the Secretary-General on Darfur, U.N. Doc S/2005/523, 2 (Aug. 11, 2005). [Reproduced in the accompanying notebook at Tab 19].

¹²¹ Criminal Code, Art. 149(3). [Reproduced in the accompanying notebook at Tab 6].

¹²² *Id.*, Art. 168(1)(a).

¹²³ *Id.*, Art. 168(1)(b).

¹²⁴ *Id.*, Art. 168(1)(c).

¹²⁵ *Id.*, Art. 51.

¹²⁶ *Ten go on trial for rape and robbery in Darfur*, SUDAN TRIB. (REUTERS), June 19, 2005 [Reproduced in the accompanying notebook at Tab 77]; *U.N. Sudan Situation Report*, U.N. Mission in Sudan, 2 (Aug. 30, 2005). [Reproduced in the accompanying notebook at Tab 32]; Sec. Gen. Sept. report at 2.[Reproduced in the accompanying notebook at Tab 20].

witnesses were cohesive and reliable.¹²⁷ No other information about the trial was made available. On August 13, 2005, one of the Special War Crimes Courts convicted three lower-level members of the Sudanese Army of the crime of “waging war” in Darfur.¹²⁸ No further information about the convictions is available.

There does not appear to be any significant difference between the cases that are being prosecuted in the Special Courts, the Specialised Court and the Special War Crimes Courts. As with the cases in the Special Courts and the Specialised Court, the Special War Crimes Courts are trying civilians and low-ranking members of the armed forces for low-level individual crimes, such as armed robbery, illegal possession of weapons and rape. These offenses do not fall within the definitions of war crimes or crimes against humanity. Furthermore, although the ICI report concluded that high-ranking Government officials, members of the Janjaweed and members of the rebel groups had potentially committed war crimes and crimes against humanity in Darfur, there have been no prosecutions of these individuals to date. Of the 116 known prosecutions (mostly for armed robbery) in the Special and Specialised Courts, only five defendants were members of the Janjaweed (and it is questionable whether all five were in fact members of the Janjaweed). The remaining 111 defendants were civilians. Of those 116 cases, 108 defendants were convicted. Most of the civilian defendants were sentenced to death. The sentences of four of the five alleged members of the Janjaweed are not known; however, the one confirmed member of the Janjaweed, who was a leader in the militia, was sentenced to a prison term and a fine.¹²⁹ Of the twenty-one known defendants that have been brought to trial in the

¹²⁷ *U.N. Sudan Situation Report* at 2 (Aug. 30, 2005). [Reproduced in the accompanying notebook at Tab 32].

¹²⁸ *Damanga Statement: Show Trials are not substitutes for International Criminal Courts*, SUDAN TRIB., Aug. 24, 2005. [Reproduced in the accompanying notebook at Tab 52].

¹²⁹ *See* pp. 19-21, *supra*.

Special War Crimes Courts, fifteen were members of the Sudanese armed forces. Ten of the fifteen soldiers were acquitted. The outcomes of the remaining trials involving the six civilians and five members of the Sudanese army are unknown.¹³⁰

The Sudanese Government's failure to create Courts that would hear cases rising to the level of war crimes and crimes against humanity, and the continued prosecution of civilians and low-ranking soldiers for low-level crimes, indicates unwillingness on the part of the Government to genuinely prosecute the alleged perpetrators of these international crimes.

(c) The committees against rape.

In July 2004, the Minister of Justice issued a decree that established rape committees in North, South and West Darfur.¹³¹ Each of the committees is composed of three women: a judge from the Court of Appeals, a lawyer from the Ministry of Justice and a police officer.¹³² The Committees were delegated the power of the district prosecutor to carry out their mandate, which was to investigate crimes of rape.¹³³ The Committees, however, limited their task to receiving complaints and forwarding them to the police. The Committees did not follow up on the referrals to determine whether the police had taken any action.¹³⁴ In cases that the Committees had recommended for prosecution, they provided no evidence as to whether prosecutions had been initiated or the perpetrators had been convicted.¹³⁵ Often, when the Committees received reports of rapes that had been committed during attacks on villages, they failed to record or investigate

¹³⁰ See pp. 23-25, *supra*.

¹³¹ ICI report at 119. [Reproduced in the accompanying notebook at Tab 22].

¹³² *Id.*

¹³³ *Id.* Under the Criminal Procedure Act, § 19, the Prosecution Attorney has the power to direct investigation in a criminal case, frame the charges, file complaints and supervise the progress of the case in court.

¹³⁴ *Id.* at 123.

¹³⁵ *Id.*

the reports.¹³⁶ The Committees determined within three weeks of beginning their work that they had completed their task and presented their reports to the Ministry of Justice. There was no further follow-up on the part of the Committee members.¹³⁷ The reports stated that only fifty cases of rape had occurred throughout the entire region of Darfur.¹³⁸ This number is in stark contrast to reports such as the ICI report, which found that widespread and systematic rape and other forms of sexual violence have occurred, and a report by the non-governmental organization, Médecins Sans Frontières, whose most recent report indicated that it had treated almost 500 victims of rape between October 2004 and early February 2005.¹³⁹

Furthermore, some victims of rape who became pregnant as a result of the rape were later arrested and charged with fornication.¹⁴⁰ When a judge visited one of the towns in which cases of such arrests had been reported, he told police officers to stop recording the women's names because the lists could be used as evidence against the officers.¹⁴¹ The flaws in the work of the rape committees and the further harassment of rape victims indicate that no serious effort has been made to hold the perpetrators of rape accountable for their actions.

The facts presented above are not conclusive proof that sham trials are occurring in the Sudanese Courts or that the Government is merely "going through the motions." However, a pattern of convictions for civilians, acquittals or far lighter sentences for members of the Sudanese armed forces and Janjaweed, and impunity for perpetrators of rape and sexual violence

¹³⁶ *Id.* at 121.

¹³⁷ *Id.* at 123.

¹³⁸ *Id.* at 121.

¹³⁹ *Id.* at 3; Médecins Sans Frontières, *The Crushing Burden of Rape: Sexual Violence in Darfur*, Briefing Paper, 2 (March 8, 2005). [Reproduced in the accompanying notebook at Tab 57].

¹⁴⁰ Katharine Houreld, *First the women are raped, then they are jailed, fined*, THE GLOBE & MAIL (SUDAN TRIB.), March 5, 2005. [Reproduced in the accompanying notebook at Tab 53].

¹⁴¹ *Id.*

does appear to be developing. This pattern strongly suggests that the Government is shielding its officials and agents from criminal responsibility for war crimes and crimes against humanity.

(2) There has not been an unjustifiable delay in the legal proceedings.

There is little evidence to suggest that the Sudanese government has unjustifiably delayed the initiation of proceedings against alleged perpetrators of crimes in Darfur in a manner that is “inconsistent with an intent to bring the person concerned to justice,” as required by Article 17(2)(b) of the Rome Statute.¹⁴² The Government of Sudan claimed for several months prior to the creation of the Special War Crimes Courts that it intended to prosecute alleged perpetrators.¹⁴³ Although arrests occurred in the period of time between the Security Council’s referral of Darfur to the ICC and the creation of the Special War Crimes Courts in Darfur, no known prosecutions or convictions took place. However, since the conflict in Darfur began, individuals have been prosecuted in the Special and Specialised Courts for committing crimes that allegedly stem from the conflict, such as armed robbery and rape.¹⁴⁴ One could argue that, since only civilians and low-ranking soldiers are being prosecuted, there has been an unjustifiable delay in prosecuting the true perpetrators of alleged war crimes and crimes against humanity. Since legal proceedings have been and continue to be initiated in the Courts, however, and the prosecutions are for offenses that were committed during the conflict in Darfur, this argument may not succeed under Article 17(2)(b).

¹⁴² Rome Statute, Art. 17(2)(b). [Reproduced in the accompanying notebook at Tab 13].

¹⁴³ *Sudan offers to try Darfur war criminals*, SUDAN TRIB. (UPI), Feb. 25, 2005 [Reproduced in the accompanying notebook at Tab 68]; *Sudan says arrests 15 officials for Darfur crimes*, SUDAN TRIB. (REUTERS), March 28, 2005 [Reproduced in the accompanying notebook at Tab 71]; *Sudanese govt will prosecute 164 people for rights abuses in Darfur*, SUDAN TRIB. (AP), March 29, 2005. [Reproduced in the accompanying notebook at Tab 75].

¹⁴⁴ See pp. 19-21, *supra*.

(3) The proceedings have not been conducted independently or impartially or in a manner that is consistent with the intent to bring the accused to justice.

A claim can be made under Article 17(2)(c) of the Rome Statute that legal proceedings are not being conducted independently, impartially or in a manner that is consistent with the intent to bring the accused to justice.¹⁴⁵ Much of the evidence for this claim overlaps with the facts suggesting that the Government is attempting to shield perpetrators from criminal responsibility. In 2004, the Government entered into an informal agreement with the United Nations, in which it agreed to bring *all* individuals and groups accused of human rights violations to justice.¹⁴⁶ As stated earlier, the facts available regarding prosecutions in the various Courts in Darfur indicate a pattern of conviction of civilians and acquittals or lighter sentences for members of the armed forces and militias. This pattern indicates selective enforcement of the law where Government officials and Government-sponsored agents are concerned.

Commentators have suggested that the drafters of the Rome Statute envisioned a court that would be utilized only when there were “special features” to a crime such as “the alleged involvement of state officials.”¹⁴⁷ Such involvement would greatly implicate a State’s willingness to genuinely prosecute individuals, as some of the accused could potentially be the Government’s own high-ranking officials. In the case of Darfur, it is undisputed that the Sudanese Government deployed the army and air force in its response to the rebel groups and its attacks against civilians.¹⁴⁸ There is also well-documented evidence that the Government

¹⁴⁵ Rome Statute, Art. 17(2)(c). [Reproduced in the accompanying notebook at Tab 13].

¹⁴⁶ Joint Communique between the Government of Sudan and the United Nations on the Occasion of the Visit of the Secretary General to Sudan (July 3, 2004). [Reproduced in the accompanying notebook at Tab 11].

¹⁴⁷ THE ROME STATUTE OF THE ICC at 31. [Reproduced in the accompanying notebook at Tab 42].

¹⁴⁸ ICI report at 158. [Reproduced in the accompanying notebook at Tab 22]; *see also Report of the independent expert on the situation of human rights in the Sudan*, U.N. Commission on Human Rights, 61st Sess., Agenda Item 3, U.N. Doc. E/CN.4/2005/11, 12 (Feb. 2005). [Reproduced in the accompanying notebook at Tab 21].

financed and armed militias and reservist groups, such as the Janjaweed and the Popular Defense Forces, in their fight against the rebel groups.¹⁴⁹ The ICI identified 51 suspects (consisting of Government officials, members of the Janjaweed, members of rebel groups and certain foreign army officers) who could be guilty of war crimes, crimes against humanity or other international crimes in connection with Darfur. Among the Government officials on the list were a number of senior Government officials.¹⁵⁰ The Sudanese Minister of Justice has stated that the list of suspects will be used as “no more than a guide” by Sudanese prosecutors.¹⁵¹

Since this statement by the Minister of Justice, it has become clear that the Courts are not focusing their prosecutorial efforts on the higher-level Government officials, members of the Janjaweed or rebel groups. Instead, they are prosecuting civilians and low-ranking soldiers. In addition, on August 4th, 2005, the President issued a provisional order that amended the People’s Armed Forces Act of 1986 to protect officers and soldiers from criminal charges arising from their official activities.¹⁵² Although this provisional order is subject to approval by the National Legislature, the fact that the order was issued at all casts serious doubt on the Government’s determination to ensure that *all* perpetrators are held accountable for crimes committed in Darfur. Given the responsibility that the Government bears in this conflict, the State’s resolve to prosecute its own officials and agents appears to be extremely weak.

¹⁴⁹ ICI report at 34 [Reproduced in the accompanying notebook at Tab 22]; *see also Human Rights Watch, Darfur Documents Confirm Government Policy of Militia Support, Briefing Paper, 2-6 (July 20, 2004)*. [hereinafter HRW Briefing Paper] [Reproduced in the accompanying notebook at Tab 55]; *see also Report of the Secretary-General on the Sudan*, pursuant to S.C. Res. 1556, 1564 and 1574, U.N. Doc. S/2005/10, 6 (Jan. 7, 2005). [Reproduced in the accompanying notebook at Tab 24].

¹⁵⁰ ICI report at 161. [Reproduced in the accompanying notebook at Tab 22].

¹⁵¹ *Sudan says view UN list of 51 Darfur war criminals as only a guide*, SUDAN TRIB. (AP), April 29, 2005. [Reproduced in the accompanying notebook at Tab 76].

¹⁵² *U.N. Sudan Situation Report*, U.N. Mission in Sudan, 2 (Sept. 6, 2005). [Reproduced in the accompanying notebook at Tab 33].

b. The Government is unable to genuinely carry out legal proceedings in connection with crimes committed in Darfur.

Under Article 17(3) of the Rome Statute, the ICC can assume jurisdiction over a case if the State's judicial system has substantially or totally collapsed, or if the judicial system is unavailable in such a way that the State cannot obtain the accused, evidence or testimony or cannot otherwise carry out the legal proceedings.¹⁵³ The ICC cannot assume jurisdiction solely because an armed conflict is occurring in a State and the judicial system is partially affected.¹⁵⁴ At least one of the three elements of the "inability" test must be satisfied.

There is no indication that the Sudanese judicial system has totally or substantially collapsed since the beginning of the conflict in Darfur. The courts continued to function during the conflict and are still functioning during the transitional period that has occurred in the wake of the end of the civil war. The courts continue to prosecute individuals for various crimes committed as part of or separate from the Darfur conflict.

The structure of the criminal justice system as a whole, however, strongly supports the argument that the judicial system is unavailable for the purpose of prosecuting grave international crimes. The crimes for which individuals can be and are being prosecuted in the Special Courts, the Specialised Court and the Special War Crimes Courts are not crimes rising to the level of war crimes or crimes against humanity. People are being charged with offenses such as armed robbery, illegal possession of weapons, rape and murder.¹⁵⁵ Although these are crimes that, if committed on a larger pluralistic scale, could fall under the category of a war crime or a crime against humanity, Sudanese law defines these crimes on an individual level. The decrees

¹⁵³ Rome Statute, Art. 17(3). [Reproduced in the accompanying notebook at Tab 13].

¹⁵⁴ Mahnoush H. Arsanjani & W. Michael Reisman, *The Law-in-Action of the International Criminal Court*, 99 Am. J. Int'l L. 385 (April 2005). [Reproduced in the accompanying notebook at Tab 45].

¹⁵⁵ See pp. 19-25, *supra*.

establishing the Courts do not address prosecutions of the large-scale or widespread commission of crimes such as war crimes or crimes against humanity. Sudanese criminal law makes no mention of the punishments that would be applicable if these crimes were committed on a larger scale. In addition, the criminal laws do not contain provisions that ensure that trials will be conducted in accordance with international standards of due process. The inadequate structure of the Sudanese judicial system renders it unable to carry out the legal proceedings that are necessary to ensure accountability for those accused of committing war crimes and crimes against humanity.

Furthermore, there are signs that the sheer number of victims will cause a tremendous backlog in the Courts. According to the U.N. Special Rapporteur for Human Rights in Sudan, the Chief Justice of one of the Special War Crimes Courts in Darfur stated that 72,000 complaints have been filed but only three cases have been heard.¹⁵⁶ The three Courts began operating in June 2005 and each of the Courts has jurisdiction over crimes committed anywhere in Darfur. While it would be time-consuming to sift through 72,000 complaints, a State that had adequate court procedures for determining whether and how a case would go to trial would be able to hear more than three cases in six months. The fact that only three cases have been heard since June suggests that the Sudanese judicial system may be unable to genuinely prosecute individuals.

(1) Rules and Procedures of the Special Courts.

It was not possible to obtain copies of the decrees establishing the Special Courts. Reports completed by the ICI, the United Nations and other non-governmental organizations, however, address several provisions of the decrees, in particular Decree No. 21, which

¹⁵⁶ *Sudan failed to try Darfur war crimes*, SUDAN TRIB., Oct. 22, 2005. [Reproduced in the accompanying notebook at Tab 64].

established a Special Court in Al-Fasher, North Darfur. This memorandum will assume that the portions of the decree that were reprinted in the reports are accurate.

The decrees that established the Special Courts do not comply with the requirements for a fair trial as defined by the ICCPR. For example, Article 5 of Decree No. 21 addresses the types of evidence that can be introduced against the accused:

- (c) The evidence of fingerprints is enough [for a conviction] and there is no need for further supporting evidence.
- (d) The Court accepts the confession of the accused and considers it evidence if it is convinced by this confession.
- (e) If the accused withdraws his confession, the Court shall take his confession into account as evidence against the accused. The accused has no right to withdraw his confession.¹⁵⁷

International law states that neither fingerprint evidence nor a confession alone is sufficient to obtain a conviction. The ICCPR states that accused persons shall have the opportunity to obtain the attendance and examination of witnesses on his behalf and to examine the witnesses against him.¹⁵⁸ In addition, the ICCPR prohibits a defendant from being compelled to confess his own guilt or testify against himself.¹⁵⁹ Article 5 of Decree No. 21, as it pertains to confessions, forces the use of a defendant's confession against him. The rules of evidence delineated in Decree No. 21 are in clear violation of the ICCPR.

Furthermore, according to Article 5(g) of Decree No. 21, attorneys have “no right to appear before the court to represent the accused.” Instead, a friend of the defendant can appear to assist the accused individual.¹⁶⁰ While an attorney can appear as a “friend” of the defendant, the “friend” does not have the same rights in the courtroom as an attorney does, i.e. there is no right

¹⁵⁷ AI memorandum to the Sudanese government at 6. [Reproduced in the accompanying notebook at Tab 49].

¹⁵⁸ ICCPR, Art. 14(3)(e). [Reproduced in the accompanying notebook at Tab 10].

¹⁵⁹ *Id.*, Art. 14(3)(g).

¹⁶⁰ Interim Report of the Special Rapporteur at 9. [Reproduced in the accompanying notebook at Tab 18].

to access the legal file, to cross-examine the prosecution's witnesses, or to call defense witnesses.¹⁶¹ This is a direct violation of Articles 14(3)(b) and 14(3)(d) of the ICCPR and Article 7(1) of the African Charter on Human and Peoples' Rights. These articles mandate that accused individuals be represented by the counsel of their choice.¹⁶² Article 5(g) of the decree also violates Article 34(5) of the Sudan's own Interim Constitution, which states that defendants have the right to legal assistance of their own choice.¹⁶³

There is no indication that Decree No. 21 has been brought into compliance with the recently approved Interim Constitution or international law. As such, trials conducted in the Special Courts will always violate the internationally recognized rights of due process, rendering the Special Courts unavailable for the prosecution of international crimes such as war crimes or crimes against humanity.

(2) Rules and Procedures of the Specialised Court in South Darfur.

It was not possible to obtain a copy of the decree establishing the Specialised Court. However, two reports completed by the ICI and another non-governmental organization address the provisions of the decree. For the purpose of analyzing the rules and procedures of the Specialised Court, this memorandum will assume that the information provided in both reports is accurate.

¹⁶¹ AI memorandum to the Sudanese government at 7. [Reproduced in the accompanying notebook at Tab 49].

¹⁶² See ICCPR, Art. 14(3), which states in part: "In the determination of any criminal charges against him, everyone shall be entitled to the following minimum guarantees, in full equality... (b) To have adequate time and facilities for the preparation of his defence and to communicate with the counsel of his own choosing" (emphasis added). The relevant provision of Article 14(3)(d) of the ICCPR is as follows: "To... defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to be assigned legal assistance, in any case where the interests of justice so require it..." (emphasis added). [Reproduced in the accompanying notebook at Tab 10]. See also African Charter, Art. 7(1), which states: Every individual shall have... (c) the right to defence, including the right to be defended by counsel of his choice (emphasis added). [Reproduced in the accompanying notebook at Tab 1].

¹⁶³ Draft Interim Constitution, Art. 34(2). [Reproduced in the accompanying notebook at Tab 14].

A major flaw of the decree establishing the Specialised Court is that it does not prohibit confessions obtained under torture or duress from being used as evidence against a defendant, even if those confessions are later retracted.¹⁶⁴ Thus, the Specialised Court violates Article 14(3)(g) of the ICCPR and Article 15 of the CAT, both of which state that such evidence should not be allowed at trial.¹⁶⁵ By allowing evidence obtained under duress to be used at trial, the Sudan acts in clear violation of its obligations under international law.

While the decree creating the Specialised Court does remedy the prohibition against representation by counsel of one's choice, it limits a defendant's access to counsel. Counsel is given limited time to visit defendants to prepare a defense, cross-examine the prosecution's witnesses and examine defense witnesses.¹⁶⁶ Furthermore, the decree does not specifically overrule Article 5(g) of the 2001 decree, which only allowed "friends" to represent a defendant in court.¹⁶⁷ By not specifically overruling Article 5(g), the judge maintains the discretion to only allow a "friend" of the defendant to speak on the defendant's behalf.

The decree also restricts a defendant's right of appeal. A defendant cannot appeal a sentence unless he or she is sentenced to death, amputation or life imprisonment.¹⁶⁸ Appeals must be made within seven days to the Chief Justice of South Darfur State and there is no right of further appeal to the Supreme Court of Sudan or the Constitutional Court of Sudan, regardless

¹⁶⁴ ICI report at 112. [Reproduced in the accompanying notebook at Tab 22].

¹⁶⁵ ICCPR, Art. 14(3)(g), which states that an individual shall not be "compelled to testify against himself or to confess guilt" [Reproduced in the accompanying notebook at Tab 10]; CAT, Art. 15, which states that "[e]ach State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings..." [Reproduced in the accompanying notebook at Tab 4].

¹⁶⁶ ICI report at 113. [Reproduced in the accompanying notebook at Tab 22].

¹⁶⁷ AI report, Darfur: No One To Complain To at 38. [Reproduced in the accompanying notebook at Tab 48].

¹⁶⁸ AI Memorandum to the Sudanese government at 7. [Reproduced in the accompanying notebook at Tab 49].

of the sentence.¹⁶⁹ This limited right to appeal appears to modify the Criminal Code's prohibition on obtaining a pardon for a death sentence, at least as applied in the Specialised Court, because it implies that a pardon could be issued in a case involving a death sentence.¹⁷⁰ Nevertheless, there is no rule in international law that grants the right to appeal based on the type of sentence one receives. The denial of the right to appeal sentences less than death, amputation or life imprisonment is a violation of the ICCPR, which states that everyone convicted of a crime has the right to have his conviction and sentence reviewed by a higher tribunal.¹⁷¹

As with Decree No. 21, which established the Special Courts, the decree establishing the Specialised Court does not appear to have been altered to conform to international requirements of due process. By failing to protect a defendant's due process rights, the Specialised Court is unavailable for the purpose of prosecuting war crimes or crimes against humanity within the dictates of international law.

(3) Rules and Procedures of the Special War Crimes Courts for Darfur.

Decision No. 705, which established the Special War Crimes Courts, contains several provisions that conform to international legal standards for fair trials. For example, paragraph 7 of the decree states that defendants may be represented by counsel of their own choosing, which conforms to Article 14 of the ICCPR.¹⁷² Paragraph 7 further states that defense attorneys are allowed to meet with the defendants, address the court on the defendants' behalf, question

¹⁶⁹ *Id.*

¹⁷⁰ *See* note 237, *infra*.

¹⁷¹ ICCPR, Art. 14(5). [Reproduced in the accompanying notebook at Tab 10].

¹⁷² *Id.*, Art. 14(3)(d).

witnesses and debate them on issues “within the confines of the testimony.”¹⁷³ Paragraph 8 of the decree states that court sessions shall be open to everyone, but reserves to the court the right to close the proceedings to the public or a particular individual if the nature of the proceedings so requires.¹⁷⁴ By mandating the right to counsel and open trials, these paragraphs of the decree align with the provisions of Article 14(1) of the ICCPR regarding fair and public hearings.¹⁷⁵

There are, however, paragraphs in the decree that diverge from international norms pertaining to fair trials. The decree states that the Court has the authority to question defendants.¹⁷⁶ This authority is separate and distinct from the prosecutor’s authority to question defendants. Although a defendant cannot be penalized for refusing to answer the Court’s questions, the decree states that the Court is “free to infer from such a position the answers or findings it deems fair.”¹⁷⁷ In essence, a judge could decide that a defendant’s silence implies guilt, which contravenes the internationally recognized right not to be compelled to testify against oneself.¹⁷⁸ If a defendant pleads guilty after the prosecution has presented its evidence, the plea is entered on the record as a confession and the Court can convict the individual solely on the basis of that admission of guilt, without allowing the defense to present its case.¹⁷⁹ This provision violates the minimum guarantees of a fair trial that are defined in Article 14 of the ICCPR, including the right of a defendant to have witnesses speak on his behalf.¹⁸⁰

¹⁷³ Press Release, Ministerial Decision No. 705 of the Chief Justice of the Supreme Court, ¶ 7 (June 23, 2005). [hereinafter Decision No. 705] [Reproduced in the accompanying notebook at Tab 59].

¹⁷⁴ *Id.* at ¶ 8.

¹⁷⁵ ICCPR, Art. 14(1). [Reproduced in the accompanying notebook at Tab 10].

¹⁷⁶ Decision No. 705, ¶ 11(1). [Reproduced in the accompanying notebook at Tab 59].

¹⁷⁷ *Id.* at ¶ 11(2).

¹⁷⁸ ICCPR, Art. 14(2)(g). [Reproduced in the accompanying notebook at Tab 10].

¹⁷⁹ Decision No. 705, ¶ 11(4). [Reproduced in the accompanying notebook at Tab 59].

¹⁸⁰ ICCPR, Art. 14(2)(e). [Reproduced in the accompanying notebook at Tab 10].

The decree also may not adequately ensure that witnesses will be truthful in their testimony. Paragraph 14 of the decree states that all witnesses who appear before the court will be required to take an oath swearing to tell “only the truth and nothing but the truth.”¹⁸¹ An exception is made, however, when the court decides that certain individuals will not understand the importance of the oath due to their “age, lack of experience *or any other reason*” (emphasis added).¹⁸² In these cases, the Court can decide to hear testimony without requiring the witness to take an oath. It is unclear how “lack of experience” is defined when evaluating whether a witness should take an oath before testifying. The decree does not clarify whether “lack of experience” pertains to a lack of experience with a courtroom, a lack of experience with the offense at issue or a lack of experience with giving testimony. The “lack of experience” element combined with the phrase “any other reason” gives the Court very broad discretion to allow unsworn testimony from a witness. A witness could conceivably take the stand and say anything at all about the defendant, whether truthful or not. As a defendant would be unable to adequately prepare in advance for such testimony, his ability to defend himself would be limited, which violates his right to a fair trial.¹⁸³

Finally, the provisions in the decree notwithstanding, the Special War Crimes Courts are required to adhere to the Criminal Procedure Act and the Evidence Act when conducting trials.

Paragraph 19 of the decree states:

The contents of this chapter [on Court Procedure] notwithstanding the court is under obligation to adhere to the Code of Criminal Procedure of 1991 as well as the rules of evidence stipulated in the 1994 law of evidence.¹⁸⁴

¹⁸¹ Decision No. 705, ¶ 14. [Reproduced in the accompanying notebook at Tab 59].

¹⁸² *Id.*

¹⁸³ ICCPR, Art. 14(3)(b). [Reproduced in the accompanying notebook at Tab 10].

¹⁸⁴ Decision No. 705, ¶ 19. [Reproduced in the accompanying notebook at Tab 59].

The chapter to which paragraph 19 refers is Chapter III of the decree, which dictates the stages of the trial process, from the initial notification of the charges to the sentencing stage. The Criminal Procedure Act and Evidence Act both address the conduct of trials in Sudanese courts. As demonstrated below, both statutes contain provisions that violate international law.¹⁸⁵ Paragraph 19 of the decree is especially troubling because it ensures that the violations of international law contained within the Criminal Procedure Act and Evidence Act will take precedence over any other provisions in Decision No. 705.¹⁸⁶

Due to grave defects in the decrees establishing the Special Courts, the Specialised Court, and the Special War Crimes Courts, the Courts will continually conduct trials in violation of international legal requirements for fair trials, as defined by the ICCPR and other international agreements to which the Sudan is a party. These structural flaws render the Courts unavailable for the purpose of prosecuting individuals for the international crimes that fall within the ICC's jurisdiction.

(4) The Criminal Act of 1991.

Although the Criminal Code was initially rejected by the Sudanese parliament, it was adopted via military decree in 1991.¹⁸⁷ The Code describes the offenses that are punishable under Sudanese law and the sentences that can be imposed as a result of violations of Sudanese criminal law. Upon further scrutiny, two concerns about the Criminal Code arise: (1) that the provisions of the Code do not allow for the adequate prosecution of grave international crimes,

¹⁸⁵ See pp. 49-52 and 55, *infra*.

¹⁸⁶ Decision No. 705, ¶ 19. [Reproduced in the accompanying notebook at Tab 59].

¹⁸⁷ Adam M. Abdelmoula, *The 'fundamentalist' agenda for human rights: the Sudan and Algeria*, Arab Studies Quarterly, 12 (Winter 1996). [Reproduced in the accompanying notebook at Tab 44].

such as war crimes and crimes against humanity, and, (2) that the provisions of the Code are not in compliance with the Sudan's obligations under international law.

(a) The Criminal Code does not sufficiently provide for the prosecution of international crimes, such as war crimes and crimes against humanity.

War crimes are specific crimes that are committed as part of a policy or plan for the large-scale commission of such crimes.¹⁸⁸ Crimes against humanity are specific crimes that are committed in a “widespread or systematic” manner.¹⁸⁹ By definition, these crimes are committed under the umbrella of a larger conflict. They do not include offenses committed by private individuals against other individuals at discrete moments in time, unless the offenses are part of a larger plan of attack.

As stated earlier, the ICI found that Government officials, members of the Janjaweed and members of the rebel groups were responsible for such crimes as perpetrating or co-perpetrating international crimes;¹⁹⁰ participating in a joint criminal enterprise;¹⁹¹ aiding and abetting international crimes;¹⁹² planning and ordering international crimes;¹⁹³ and knowingly failing to prevent or repress the perpetration of international crimes.¹⁹⁴ Sudanese criminal law recognizes the offenses of committing a joint act without criminal conspiracy, giving an order to commit an offense and compulsion thereof, committing criminal conspiracy, abetment and assisting in the

¹⁸⁸ Rome Statute, Art. 8(1). [Reproduced in the accompanying notebook at Tab 13].

¹⁸⁹ *Id.*, Art. 7(1).

¹⁹⁰ ICI report at 135. [Reproduced in the accompanying notebook at Tab 22].

¹⁹¹ *Id.* at 138.

¹⁹² *Id.* at 139.

¹⁹³ *Id.* at 140-141.

¹⁹⁴ *Id.* at 143.

commission of an offense.¹⁹⁵ In general, individuals convicted on any of these grounds are held individually criminally liable for the offense and are punished with the penalty prescribed for that offense.¹⁹⁶ Because the Sudanese legal standard for individual criminal responsibility appears to conform to the legal definition provided by international criminal law, individuals could conceivably be charged with such offenses as they relate to specific crimes committed in Darfur in a manner that complies with international law.¹⁹⁷

The ICI also determined, however, that the mass killing of civilians; crimes of sexual violence; torture; forced displacement; abductions and enforced disappearances; arbitrary arrests and detentions; looting and pillaging; and persecution were sufficiently widespread and systematic as to constitute crimes against humanity and war crimes. These findings raise the question whether the Sudan's criminal justice system is competent to prosecute such international offenses.¹⁹⁸

The Criminal Code has seventeen categories of offenses.¹⁹⁹ Four categories of offenses are most relevant to the inquiry presented in this memorandum. These categories are: offenses affecting persons and human body (such as Articles 129-132 pertaining to murder and homicide); offenses of honour, reputation and public morality (such as Article 149 pertaining to rape); offenses against personal liberty (such as Article 162 pertaining to kidnapping); and

¹⁹⁵ Criminal Code, Art. 21-23, 24(2)-(3), 25(2)-(4) and 26. [Reproduced in the accompanying notebook at Tab 6].

¹⁹⁶ *Id.*

¹⁹⁷ *See Rutaganda*, ICTR Trial Chamber, ICTR-96-3, § 35 (Dec. 6, 1999) [Reproduced in the accompanying notebook at Tab 36]; *see also Kunarac et al.*, ICTY Trial Chamber, IT-96-23&23/1, § 387 (Feb. 22, 2001). [Reproduced in the accompanying notebook at Tab 37].

¹⁹⁸ ICI report at 160. [Reproduced in the accompanying notebook at Tab 22].

¹⁹⁹ *See* Criminal Code, Parts V-XVII. The categories of offenses are: offenses against the state; offenses relating to disciplinary forces; sedition; offenses relating to public tranquillity [sic]; offenses relating to public health and safety; offenses relating to public servants and employees; offenses prejudicing the administration of justice; offenses of counterfeiting and forgery; offenses relating to religions; offenses affecting persons and human body; offenses of honour, reputation and public morality; offenses against personal liberty; and offenses against property. [Reproduced in the accompanying notebook at Tab 6].

offenses against property (such as Articles 167 and 170 pertaining to armed robbery and capital theft).

The Criminal Code defines murder as an intentional killing or the intent to commit an act with the knowledge that death will be the probable consequence of the act.²⁰⁰ The punishment for murder is death by retribution or, if retribution is not imposed, imprisonment for no more than ten years without prejudice to the right of *dia*.²⁰¹ Retribution can be remitted as a punishment in any of the following cases:

(a) where the victim or his relative is an offspring of the offender; (b) where the victim or some of his relatives have pardoned the offender; (c) where the injury occurs with the consent of the victim; (d) where the offender became insane after a sentence of retribution was imposed upon him; or (e) where, in a case of wounding, the part of the offender that is subject to retribution ceases to exist.²⁰²

It is possible, therefore, that an individual could be convicted of murder but exempted from retribution. In such a case, the defendant would receive a sentence of less than ten years in prison or, alternatively, he would be ordered to pay *dia* to the victim.

The Criminal Code also recognizes the offenses of semi-intentional homicide (when homicide is committed as a result of a criminal act on the human body in which there is no intent to cause death and death is not a probable consequence of the act)²⁰³ and homicide by negligence (when the homicide is not murder or semi-intentional homicide and the offender causes it by negligence or by the lack of caution or an unlawful act).²⁰⁴ There are several cases provided in the Criminal Code that would constitute semi-intentional homicide, one of which occurs when

²⁰⁰ *Id.*, Art. 130(1).

²⁰¹ *Id.*, Art. 130(2).

²⁰² *Id.*, Art. 31.

²⁰³ *Id.*, Art. 131(1).

²⁰⁴ *Id.*, Art. 132(1).

the offender “exaggerates or exceeds” the limits of power authorized to him while committing the act and the result is death.²⁰⁵

Government officials, members of Government armed forces and the Janjaweed, and members of the rebel groups could argue that they exaggerated or exceeded the limits of their authority when they carried out attacks during the conflict in Darfur. If this argument was accepted by a court and a defendant was subsequently convicted of semi-intentional homicide, his punishment would be no more than five years in prison, not precluding an order to pay *dia* to the victim.²⁰⁶ If an individual is convicted of homicide by negligence, the punishment is no more than three years in prison, without prejudice to the right of *dia*.²⁰⁷

The punishment for mass killing of civilians is not defined in the Criminal Code. The Code does state that when an individual commits more than one offense, the greatest penalty for any of those offenses shall be inflicted.²⁰⁸ In terms of murder and homicide, this means that a sentence of death or, in certain cases, a term of imprisonment for no more than ten years could be imposed, in addition to any *dia* that was ordered. The Criminal Code does not contain any guarantee, however, that, in the case of mass murder or a related grave crime, only the most serious sentence will be imposed. This omission could result in lighter sentences for crimes rising to the level of war crimes and crimes against humanity, which would be inconsistent with the goal of securing justice for the victims in Darfur.

²⁰⁵ *Id.*, Art. 131(2)(g).

²⁰⁶ *Id.*, Art. 131(3).

²⁰⁷ *Id.*, Art. 132(2)

²⁰⁸ *Id.*, Art. 40.

Rape is defined as “sexual intercourse by way of adultery or homosexuality with any person without consent.”²⁰⁹ The Criminal Code states that no consent is given where the victim is in the custody or under the authority of the perpetrator, which would be applicable to many of the cases of rape in Darfur.²¹⁰ The ICI found that widespread rape had been committed against women and girls by members of the Sudanese army and Janjaweed in all three states of Darfur.²¹¹ The report also found that individual victims were often raped by more than one man.²¹² As stated earlier, when an individual commits more than one offense, the penalty inflicted is that which is the greatest for any of those offenses.²¹³ Consequently, in the many recorded cases of soldiers or members of the Janjaweed abducting and raping several women and girls at a time,²¹⁴ the greatest penalty that any one of these men might receive under the Criminal Code would be 100 lashes and imprisonment for no more than ten years.²¹⁵ Arguably, such a punishment would be inconsistent with ensuring justice for the victims of rape and sexual violence in Darfur.

Kidnapping is defined as compelling a person to leave, or employing deceit to induce an individual to leave a place, with the intention of committing an offense on the victim’s person or

²⁰⁹ *Id.*, Art. 149(1).

²¹⁰ *Id.*, Art. 149(2).

²¹¹ ICI report at 87. [Reproduced in the accompanying notebook at Tab 22].

²¹² *Id.*; see also *U.N. Sudan Situation Report*, U.N. Mission in Sudan, 3 (Sept. 19, 2005) (which reported two separate abductions of females by the same group of three soldiers). [Reproduced in the accompanying notebook at Tab 35].

²¹³ Criminal Code, Art. 40. [Reproduced in the accompanying notebook at Tab 6].

²¹⁴ See ICI report documenting abductions and rapes of female villagers at 87-93. [Reproduced in the accompanying notebook at Tab 22].

²¹⁵ Criminal Code, Art. 149(3). This would be considered a *Ta’azir* penalty, which is any penalty other than *hudud* or retribution. [Reproduced in the accompanying notebook at Tab 6].

liberty.²¹⁶ As there is no provision in the Criminal Code for forcible displacement, perpetrators could be charged under Sudanese law with the crimes of abduction or kidnapping and would receive at most a prison term of ten years, or a fine, or both.²¹⁷ The ICI found that abductions by both Government forces and the rebel groups were of such a level as to merit classification as a war crime.²¹⁸ The report also found that over one million people were forcibly displaced from their homes as a result of the conflict, which constituted a crime against humanity.²¹⁹ Given the sheer number of people who were abducted and/or forcibly displaced, the potential sentence that could be imposed would arguably not be sufficient to provide justice for the victims.

There are no provisions in the Criminal Code that specifically address looting, pillage or the destruction of property, including villages. The provisions that most closely align with these crimes are capital theft, theft and criminal misappropriation. Capital theft is defined as the covert taking of any moveable property of a certain value belonging to another, with the intention of appropriation.²²⁰ An individual convicted of capital theft would be punished with amputation of the right hand from the joint (a *hud* penalty) and, if the individual is convicted of capital theft a second time, imprisonment for at least seven years.²²¹ Theft is defined as the dishonest taking of moveable property belonging to another without that person's consent.²²² A conviction of theft carries with it a prison term of at least seven years and a potential fine or whipping of no more

²¹⁶ *Id.*, Art. 162. Art. 161 addresses abduction, but this offense only applies to the abduction of “any person below puberty or insane persons...in order to remove him from the custody of lawful guardian without the consent of such guardian.” The offense of kidnapping has a broader scope than the offense of abduction.

²¹⁷ *Id.*

²¹⁸ ICI report at 106. [Reproduced in the accompanying notebook at Tab 22].

²¹⁹ *Id.* at 138.

²²⁰ Criminal Code, Art. 170(1). [Reproduced in the accompanying notebook at Tab 6].

²²¹ *Id.*, Art. 171.

²²² *Id.*, Art. 174(1).

than 100 lashes.²²³ Criminal misappropriation is defined as taking, finding, borrowing, or mistakenly possessing property belonging to another and denying or dishonestly disposing of the property.²²⁴ One convicted of criminal misappropriation would be sentenced to no more than three years in prison, or a fine, or both.²²⁵ The ICI determined that several hundred villages and hamlets were burned and destroyed throughout the three states in Darfur.²²⁶ None of these offenses sufficiently contemplate the scale of the destruction achieved by Government and rebel forces during the conflict.

Over all of these offenses hangs the defense of “performance of duty and exercise of right.”²²⁷ As stated earlier, the ICI report found that the Sudanese army, security forces and the Government-sponsored Janjaweed were heavily implicated in the death and destruction that occurred in Darfur.²²⁸ Under the Sudanese Criminal Code, if a person is bound or authorized to act by law or by a legal order issued from a competent authority, or the perpetrator *believes in good faith* that he is bound or authorized to act, then the act is not deemed to be an offense.²²⁹ This provision would apply to charges of committing joint acts without criminal conspiracy, criminal conspiracy, ordering the commission of an offense, and aiding and abetting, as well as the specific offenses themselves. It is highly likely that Government officials and members of the Janjaweed would invoke the defense of “performance of duty” to claim that their actions were not offenses under the law. Because there is no provision in the Criminal Code that overrides this

²²³ *Id.*, Art. 174(2).

²²⁴ *Id.*, Art. 180(1).

²²⁵ *Id.*, Art. 180(2).

²²⁶ ICI report at 3, 61 and 63. [Reproduced in the accompanying notebook at Tab 22].

²²⁷ Criminal Code, Art. 11. [Reproduced in the accompanying notebook at Tab 6].

²²⁸ ICI report at 3. [Reproduced in the accompanying notebook at Tab 22].

²²⁹ Criminal Code, Art. 11. [Reproduced in the accompanying notebook at Tab 6].

defense in cases of grave international crimes, a Sudanese court could exempt a defendant from punishment upon finding that the perpetrator was, or believed he was, acting under orders or authorization.

As the Criminal Code makes no mention of crimes rising to the level of grave international crimes, and it protects individuals acting under actual or perceived authority, it cannot be effectively used to prosecute individuals for alleged war crimes or crimes against humanity.

(b) The Criminal Code does not comply with international law.

The Criminal Code contains several provisions that violate international law. For example, the Criminal Code authorizes the execution of children under the age of eighteen who have committed *hudud* and retribution offenses, which carry the most serious penalties.²³⁰ The Criminal Code defines an adult as a person whose “puberty has been established by definite natural features and who has attained 15 years of age.”²³¹ Even if the features of puberty have not manifested themselves, a person who reaches the age of 18 will be considered an adult under the law.

Hudud offenses consist of drinking alcohol (Article 78), apostasy (Article 126), adultery (Article 145), false accusation of unchastity (Article 157), defamation (Article 159), armed robbery (Article 167) and capital theft (Article 170).²³² When the crime is murder, retribution takes the form of death by hanging or, if the court so decides, death in the same manner in which

²³⁰ *Id.*, Art. 28(3).

²³¹ *Id.* at 33.

²³² *Id.*

the offender caused death.²³³ If an individual under the age of eighteen commits one of these offenses, then by law he or she can be put to death.²³⁴ The execution of individuals who are under the age of eighteen violates international legal norms, specifically those contained within the ICCPR and the CRC, both of which have been ratified by the Sudan.²³⁵

Furthermore, the Criminal Code states that no one convicted of committing a *hudud* offense shall be eligible for a pardon.²³⁶ Consequently, if an individual is sentenced to death for committing an offense such as armed robbery or capital theft, he or she cannot obtain a pardon. A punishment of retribution can only be remitted with the pardon of the victim or his relative.²³⁷ International law states that individuals sentenced to death must have the right to seek a pardon of the sentence and that pardons should be made available for such sentences.²³⁸ This provision of the Criminal Code effectively removes the right of a defendant sentenced to death to have his sentence reviewed by a higher court, as required under international law.²³⁹

²³³ *Id.*

²³⁴ *Id.*; see also *Report of the Special Rapporteur, 'Civil and Political Rights, including the question of Disappearances and Summary Executions,'* U.N. Commission on Human Rights, 61st Sess., Agenda Item 11, U.N. Doc. E/CN.4/2005/7/Add.2 (Aug. 6, 2004). [Reproduced in the accompanying notebook at Tab 25]; see also *U.N. Sudan Situation Report*, U.N. Mission in Sudan, 2 (Sept. 11, 2005) (expressing concern about executions of individuals who are under the age of 18). [Reproduced in the accompanying notebook at Tab 34].

²³⁵ ICCPR, Art. 6(5), which states: "Sentence of death shall not be imposed for crimes committed by persons below the age of eighteen" [Reproduced in the accompanying notebook at Tab 10]; CRC, Art. 37(a) which states that States Parties shall ensure that: "... Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age" [Reproduced in the accompanying notebook at Tab 5]; see also CRC, Art. 1, which states that, for the purposes of the Convention, a child is defined as "every human being below the age of eighteen years"; see also Arab Charter, Art. 12, which states in part that "The death penalty shall not be inflicted on a person under 18 years of age." [Reproduced in the accompanying notebook at Tab 2].

²³⁶ Criminal Code, Art. 38(1). [Reproduced in the accompanying notebook at Tab 6].

²³⁷ *Id.*, Art. 38(2).

²³⁸ See ICCPR, Art. 6(4), which states: "Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases" [Reproduced in the accompanying notebook at Tab 10]; see also Arab Charter, Art. 10, which states in part that "anyone sentenced to death shall have the right to seek pardon or commutation of the sentence." [Reproduced in the accompanying notebook at Tab 2].

²³⁹ ICCPR, Art. 14(5). [Reproduced in the accompanying notebook at Tab 10].

It is a well-established rule of international criminal law that, when determining criminal charges against an individual, the individual is entitled to a “fair and public hearing by a competent, independent and impartial tribunal.”²⁴⁰ By failing to provide for a full right to appeal in cases involving death sentences, the Sudanese Criminal Code fails to protect the right to a fair hearing. This is a tremendous flaw in the Code that greatly undermines the judicial system’s ability to conduct fair trials.

(5) The Criminal Procedure Act of 1991.

The Criminal Procedure Act defines the procedures to be used in the criminal justice process. Several provisions of the Act conflict with international legal standards for a fair trial.

In 1991, the Criminal Procedure Act was amended to allow prosecuting attorneys and members of the police force to act on their own initiative to arrest, interrogate and detain individuals, regardless of whether an arrest warrant was obtained from a magistrate.²⁴¹ As a result of this amendment, prosecuting attorneys and the police were given astonishingly broad authority to arrest people at will.

Under Sudanese criminal law, an arrest warrant must be in writing and it must contain the reasons for the arrest and the specifics of the charge, thereby putting the detainee on notice as to the reasons for his arrest and detention.²⁴² There is no corresponding provision in the Criminal Procedure Act for offenses that do not require a warrant in order to arrest a suspect. Individuals can be arrested with no knowledge, and no right to knowledge, of the offense which they have

²⁴⁰ *Id.*, Art. 14(1). Note that the due process rights defined in the ICCPR are not restricted solely to the rights of a defendant at trial. Rather, they encompass the entire legal process, from the initial arrest to the final determination of the sentence.

²⁴¹ Criminal Procedure Act, § 44, § 67, § 68(2) and Schedule II. [Reproduced in the accompanying notebook at Tab 7].

²⁴² *Id.*, § 69(1).

allegedly committed. Under international law, however, an individual has a right to know the reasons for his or her arrest and detention.²⁴³

These arrest-without-warrant provisions authorize arbitrary arrests and detentions in direct violation of established international law.²⁴⁴ This authorization is especially important in the case of Darfur because the list of offenses for which an arrest warrant is not required include murder, rape, armed robbery and capital theft, which are the primary offenses with which individuals are being charged in connection with the conflict in Darfur.²⁴⁵ This situation is concerning because the Government could use the arrest-without-warrant provisions to arrest people even when there is no real evidence of their participation in the crimes and then use the arrests as proof that they are genuinely prosecuting perpetrators of crimes committed in Darfur.

The Criminal Procedure Act also authorizes summary trials for offenses which are punishable by imprisonment, whipping or a fine, or for any other offenses that the court deems appropriate to try summarily.²⁴⁶ In essence, *any* offense can be heard in the form of a summary trial. This is problematic because the procedures of a summary trial differ significantly from the procedures of a regular trial.

Under the Criminal Procedure Act, a regular trial begins with a summary of the basic evidence against the defendant, a verification of the witnesses and a verification of the case

²⁴³ ICCPR, Art. 9(1)-(2) [Reproduced in the accompanying notebook at Tab 10]; African Charter, Art. 6 [Reproduced in the accompanying notebook at Tab 1]; Arab Charter, Art. 8 [Reproduced in the accompanying notebook at Tab 2]; *see also* Cairo Declaration on Human Rights in Islam, Organization of the Islamic Conference, 19th Islamic Conference of Foreign Ministers, Art. 20 (*adopted* Aug. 5, 1990). [hereinafter Cairo Declaration] The Sudan is a member of the Organization of the Islamic Conference and was present at the 19th Islamic Conference of Foreign Ministers. [Reproduced in the accompanying notebook at Tab 3].

²⁴⁴ *Id.*

²⁴⁵ Criminal Procedure Act, Schedule II [Reproduced in the accompanying notebook at Tab 7]; *see also*, Criminal Code, Art. 130, 149, 167 and 170. [Reproduced in the accompanying notebook at Tab 6].

²⁴⁶ Criminal Procedure Act, § 175. [Reproduced in the accompanying notebook at Tab 7].

before the prosecution is allowed to begin presenting its case.²⁴⁷ A summary trial begins with statements by the prosecution and the complainant.²⁴⁸ Unlike a regular trial, the charges are not presented to the defendant at the close of the prosecution's case and the defendant is not given the opportunity to formally claim guilt or innocence.²⁴⁹ Beyond replying initially to the prosecutor's statements and presenting witnesses on the defendant's behalf, the defense is not allowed to present any other evidence during the trial.²⁵⁰ Although the prosecution and the defense are allowed to have witnesses testify, there does not appear to be any right to examine or cross-examine any of the witnesses.²⁵¹ After the witnesses for both sides have made statements to the court, a judgment of conviction or acquittal is rendered.²⁵² Neither side has an opportunity to present evidence in mitigation or aggravation of the sentence.²⁵³ Furthermore, the Criminal Procedure Act does not require that the evidence presented or the charges leveled against a defendant during a summary trial be recorded.²⁵⁴

The rules for summary trials violate the minimum due process guarantees contained in the ICCPR. The ICCPR mandates that defendants have the right to be informed promptly of the nature and cause of the charges against them, to examine the witnesses against them, and to

²⁴⁷ *Id.* at § 139(1).

²⁴⁸ *Id.* at § 176(1).

²⁴⁹ *Id.* at § 139(1)(f)-(g), compared to § 176(1).

²⁵⁰ *Id.* at § 176(1)(b) and (c).

²⁵¹ § 176 of the Criminal Procedure Act contains no provision that specifically addresses a party's right to examination or cross-examination of witnesses.

²⁵² *Id.* at 176(1)(d) and (e).

²⁵³ *Id.* at § 139(1)(l).

²⁵⁴ *Id.* at § 177.

defend themselves in person or through legal counsel.²⁵⁵ In a summary trial, a defendant is afforded none of these guarantees.

Finally, the Criminal Procedure Act states that criminal suits shall not be initiated against individuals who have procedural or substantive immunity, except as provided by law.²⁵⁶ Furthermore, if any Government officials or agents are convicted of committing crimes in Darfur, they can be pardoned by the President. Under the Criminal Procedure Act, the President has the power to remit conviction or penalty or to issue a general pardon in all cases except *hudud* offenses (which consist of drinking alcohol, apostasy, adultery, defamation, false accusations of unchastity, armed robbery and capital theft).²⁵⁷ The only limitation on the President's power of remission or pardon is that he must consult with the Minister of Justice before issuing his decision.²⁵⁸ As a result, if a Government official or agent is convicted of a crime such as murder or the related crime of abetting or ordering murder, which are not *hudud* offenses, the President could overturn that conviction for any reason.

The vast presidential power of remission and pardon, combined with the immunity provided by law, virtually ensures that Government officials will not be prosecuted for their roles in the crimes committed in Darfur. In addition, the Criminal Procedure Act violates international standards for a fair trial such that the Sudan will be unable to sufficiently conduct legal proceedings in Darfur.

²⁵⁵ ICCPR, Art. 14 (3)(a), (d) and (e) [Reproduced in the accompanying notebook at Tab 10]; *see also* African Charter, Art. 7(1)(c), which provides for the right to defense. [Reproduced in the accompanying notebook at Tab 1].

²⁵⁶ Criminal Procedure Act, § 35(c). [Reproduced in the accompanying notebook at Tab 7].

²⁵⁷ *Id.*, § 208(1).

²⁵⁸ *Id.*, § 211(2).

(6) The National Security Forces Act of 1999.

The National Security Forces Act (“National Security Law”) defines the framework within which members of the security forces can operate. Unfortunately, a copy of the Act could not be located. The ICI report, however, contains information about several important provisions of the Act that pertain to the implementation of the justice system in the Sudan.

Section 31 of the National Security Law complements Articles 67 and 68 of the Criminal Procedure Act by allowing security agents to carry out arrests, searches, detentions and investigations.²⁵⁹ The agents have three days to inform the detainee of the reasons for the arrest and detention. This three-day period may be extended for three months, at the discretion of the Director General of the National Security and Intelligence Services (“NSIS”), and then extended for another three months, with the approval of the Attorney General.²⁶⁰ If necessary, the Director General may ask the national Security Council for permission to extend the detention for another three months.²⁶¹ Thus, it is possible that an individual could remain in detention for more than nine months with no information as to why he has been detained or whether he will be charged with a crime. Section 31 is a violation of the right to be free from arbitrary arrest and detention, the right to be informed of the charges against oneself and the right to be tried without undue delay.²⁶²

A detainee can appeal the national Security Council’s decision to extend his detention by another three months to a judge. According to the ICI report, however, there is no guarantee of

²⁵⁹ ICI report at 114. [Reproduced in the accompanying notebook at Tab 22].

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² ICCPR, Art. 9, 14(3)(a) and 14(3)(c) [Reproduced in the accompanying notebook at Tab 10]; African Charter, Art. 6 and Art. 7(1)(d) [Reproduced in the accompanying notebook at Tab 1]; Arab Charter, Art. 8. [Reproduced in the accompanying notebook at Tab 2].

immediate access to counsel.²⁶³ As stated earlier, international law requires that a defendant be represented by counsel of choice or, if the defendant cannot afford counsel, by court-appointed counsel.²⁶⁴

Section 32 of the National Security Law allows a detainee to communicate with his family if the communication does not “prejudice the progress of the interrogation, inquiry and investigation of the case.”²⁶⁵ The ICI reported that typically when a detainee requested permission to communicate with his family, permission was denied.²⁶⁶ As the ICI stated in its report, a detainee could effectively become an *incommunicado* detainee whose detention could exceed twelve months, without charge, with no access to counsel, no appearance in court and no visitors.²⁶⁷ Such a detention is a violation of due process under the ICCPR.²⁶⁸

Broad immunity is given to agents of the NSIS under Section 33 of the National Security Law.²⁶⁹ Members of the NSIS cannot be compelled to give information about activities that they have done in the course of their duties.²⁷⁰ Furthermore, civil or criminal action cannot be instituted against agents of the NSIS, except with the approval of the Director General. If legal action against an agent is approved by the Director General, a trial is conducted in a regular court

²⁶³ ICI report at 114. [Reproduced in the accompanying notebook at Tab 22].

²⁶⁴ ICCPR, Art. 14(3)(d). [Reproduced in the accompanying notebook at Tab 10].

²⁶⁵ ICI report at 114. [Reproduced in the accompanying notebook at Tab 22].

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ ICCPR, Art. 4. [Reproduced in the accompanying notebook at Tab 10].

²⁶⁹ ICI report at 114. [Reproduced in the accompanying notebook at Tab 22]; *see also Sudan Human Rights Organization, The Situation of Human Rights in Sudan*, 4 (2003). [hereinafter SHRO report] [Reproduced in the accompanying notebook at Tab 65].

²⁷⁰ *Id.*

but it is conducted in secret.²⁷¹ A “fair and public” hearing is an essential requirement of international law.²⁷² Secret trials, by definition, violate international law.

Approval of legal action against an agent will generally only be given, however, if the activities were not done in the course of an agent’s normal duties.²⁷³ Thus, as the ICI suggests, under the protection of the National Security Law a security agent could torture a suspect to death and be protected from prosecution, as long as his acts are done in the course of his duties.²⁷⁴

The National Security Law is similar to the Criminal Procedure Act in that it codifies serious violations of international due process rights and guarantees broad immunity for members of the State security forces. These flaws in the law ensure that the judicial system will be unavailable to those seeking to prosecute Government agents for their roles in the commission of alleged war crimes or crimes against humanity.

(7) The Evidence Act of 1993.

The Evidence Act negatively impacts a defendant’s right to a fair trial in a Sudanese court. Article 10 of the Evidence Act allows courts to use evidence obtained under duress.²⁷⁵ International law has long recognized that evidence obtained under duress should not be used against a defendant in a court proceeding. The use of evidence obtained under duress effectively

²⁷¹ ICI report at 115. [Reproduced in the accompanying notebook at Tab 22].

²⁷² ICCPR, Art. 14(1). [Reproduced in the accompanying notebook at Tab 10].

²⁷³ ICI report at 115. [Reproduced in the accompanying notebook at Tab 22].

²⁷⁴ *Id.*

²⁷⁵ Evidence Act, Art. 10 (which states: “Without prejudice to the provisions on the inadmissible evidence, evidence shall not be rejected merely because it has been obtained by unlawful means whenever the Court is satisfied with the genuineness of its substance.”). [Reproduced in the accompanying notebook at Tab 8].

compels a defendant to testify against himself, which is a violation of due process.²⁷⁶ By allowing such evidence, the Sudanese judicial system greatly decreases the likelihood of obtaining convictions in accordance with international standards of due process and fair trials.

As demonstrated above, Sudanese criminal laws contain provisions that prevent the effective and fair prosecution of crimes in accordance with international law. In particular, the expansive immunity for Government officials, Government agents and members of the security forces provided under the Criminal Code, the Criminal Procedure Act and the National Security Law suggests that those responsible for orchestrating alleged war crimes and crimes against humanity will not be prosecuted. Additional immunity is granted by Articles 60 and 92 of the Interim Constitution, which grant immunity from legal proceedings to the President and members of the National Legislature.²⁷⁷ Given the heavy involvement of the Government in the situation in Darfur, it is very likely that the immunities provided under Sudanese law will be invoked if Government officials or agents are charged with committing crimes.

The Sudanese Government has made no effort to modify the Sudanese laws or the judicial system to make them more amenable to trying grave international crimes.²⁷⁸ For complementarity to be applied in a State's favor, a State needs to adopt domestic legislation that prohibits crimes within the ICC's jurisdiction.²⁷⁹ The lack of implementation of domestic legislation that accords with international procedural and substantive legal standards is an

²⁷⁶ See footnote 62 pertaining to CAT, Art. 15, *supra* [Reproduced in the accompanying notebook at Tab 4]; *see also* ICCPR, Art. 14(3)(g), which prohibits a defendant from being compelling to testify against himself or confess guilt [Reproduced in the accompanying notebook at Tab 10]; *see also* ICTY Rules of Procedure and Evidence, rev. 36, Rule 42(A)(iii) (July 21, 2005) [Reproduced in the accompanying notebook at Tab 38].

²⁷⁷ Draft Interim Constitution, Art. 60 and 92. [Reproduced in the accompanying notebook at Tab 14].

²⁷⁸ *Statement of Special Rapporteur of the Commission on Human Rights on the situation of human rights in the Sudan*, U.N. Commission on Human Rights, 59th Sess., Agenda Item 9, U.N. Doc. E/CN.4/2003/42, 5 (March 2003). [Reproduced in the accompanying notebook at Tab 27].

²⁷⁹ Philippe Kirsch, *The International Criminal Court: A New and Necessary Institution Meriting Continued International Support*, 28 *Fordham Int'l L.J.* 292, 300 (Jan. 2005). [Reproduced in the accompanying notebook at Tab 47].

indication of a State's inability to prosecute.²⁸⁰ The draft Interim Constitution states that all rights and freedoms enshrined in international human rights instruments ratified by the Sudan will be an "integral part" of the Interim Constitution.²⁸¹ However, no direct domestic legislation has been drafted or implemented since the approval of the Interim Constitution. Since Sudanese laws, as they are currently enforced, do not support the prosecution of crimes such as war crimes or crimes against humanity, the national judicial system is unavailable as a mechanism for ensuring accountability in Darfur.

4. It is necessary to evaluate Darfur under the remaining provisions of Article 17 to determine whether the case is admissible to the ICC for prosecution.

Article 17 of the Rome Statute provides several other avenues for determining whether a case is inadmissible to the ICC. First, if a case has been investigated by a State which has jurisdiction over it and the State has genuinely decided not to prosecute, the ICC cannot admit the case for prosecution.²⁸² Second, if the persons concerned have already been tried for crimes falling within the jurisdiction of the ICC, then they cannot be prosecuted by the ICC for those same crimes.²⁸³ Third, if the case is not of sufficient gravity to justify further action by the Court, the ICC cannot assume jurisdiction.²⁸⁴

²⁸⁰ Flavia Lattanzi, *The International Criminal Court and National Jurisdictions*, in *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A CHALLENGE TO IMPUNITY*, 181 (Mauro Politi & Giuseppe Nesi eds., 2001). [Reproduced in the accompanying notebook at Tab 39].

²⁸¹ *Amnesty International*, Memorandum to the National Constitutional Review Commission, AFR 54/049/2005, 2 (2005). [Reproduced in the accompanying notebook at Tab 50].

²⁸² Rome Statute, Art. 17(1)(b). [Reproduced in the accompanying notebook at Tab 13].

²⁸³ *Id.*, Art. 17(1)(c).

²⁸⁴ *Id.*, Art. 17(1) (d).

a. The little information that is available suggests that the Sudan has made a disingenuous decision not to prosecute any individuals.

Article 17(1)(b) of the Rome Statute states that a case is inadmissible where a State with jurisdiction over the case has made a genuine decision not to prosecute the accused, unless the decision was reached as a result of the State's unwillingness or inability to genuinely conduct prosecutions.²⁸⁵

Although there is information about trials resulting in acquittals, there are no known cases of the Government investigating an individual and then declining to prosecute that person. The evidence presented above, however, suggests that the Government is shielding its officials and agents from prosecution and selectively enforcing the law against civilians and low-ranking soldiers. In addition, evidence was presented above that demonstrates that the structure of the judicial system is such that it is unavailable to those seeking to prosecute the perpetrators of serious international crimes. Since the Sudan is unwilling and unable to genuinely prosecute individuals for crimes committed in Darfur, one could argue that the Sudan has not truly investigated cases or made a genuine decision not to prosecute within the meaning of Article 17(1)(b).

b. Under Article 17(1)(c), the persons concerned have not already been tried for conduct that is the subject of the complaint to the ICC.

If a defendant has been convicted of a crime that falls under the jurisdiction of the ICC, and a trial in the ICC is not allowed under Article 20(3) of the Rome Statute, then the Court

²⁸⁵ *Id.*, Art. 17(1)(b).

cannot admit the case for prosecution.²⁸⁶ This element of the inadmissibility test also relates to the “unwillingness” and “inability” prongs of the inadmissibility test.

Even if an individual is convicted of a crime that falls under the Court’s jurisdiction, there are exceptions to the rule that would allow the Court to assume jurisdiction. According to Article 20(3), if the domestic proceedings were conducted to shield the accused or were not conducted independently, impartially or consistent with the intent to ensure justice, then the ICC can retry the individual for the same crime.²⁸⁷ Consequently, if the Sudan does prosecute cases involving grave international crimes, but continues its pattern of shielding the perpetrators from criminal responsibility or not conducting proceedings in a manner that is consistent with the intent to bring the perpetrators to justice, the ICC could try the defendants for the same international crimes.

If, however, the conviction was for a crime other than genocide, a crime against humanity, a war crime or a crime of aggression, then the ICC can assume jurisdiction regardless of the manner in which the trials were conducted. As stated above, the Sudanese courts have charged and convicted individuals for committing crimes such as armed robbery, arson, illegal possession of weapons, rape and murder. These charges and convictions, however, have dealt with individual instances of violence or illegal conduct, which are not the types of actions that the ICC was established to prosecute. The ICI found that Government officials, members of the Janjaweed and members of the rebel groups could potentially be responsible for perpetrating and co-perpetrating international crimes; participating in a joint criminal enterprise; planning and ordering international crimes; and knowingly failing to prevent or repress international crimes.²⁸⁸

²⁸⁶ *Id.*, Art. 17(1)(c).

²⁸⁷ *Id.*, Art. 20(3).

²⁸⁸ ICI report at 135-143 [Reproduced in the accompanying notebook at Tab 22]; *see also* pp.7- 8, *supra*.

These crimes could perhaps be termed “umbrella” crimes that encompass and encourage the commission of physical crimes, such as mass killing, widespread rape and sexual violence, and forcible displacement. Furthermore, on June 1, 2005, the Prosecutor for the ICC initiated an investigation into crimes that had allegedly been committed in Darfur.²⁸⁹ The Prosecutor mentioned several grave crimes that had occurred in Darfur that fell within the Court’s jurisdiction: the killing of thousands of civilians, the widespread destruction and looting of villages, the resulting forced displacement of over one million civilians, and pervasive rape and sexual violence.²⁹⁰ The Prosecutor stated that the decision to investigate stemmed from the “absence of criminal proceedings related to the case on which he would focus.”²⁹¹

Despite extensive documentation of the crimes by the ICI and several non-government organizations, the Sudanese courts have not yet charged or convicted anyone of committing “umbrella” crimes or physical crimes on a large scale or in a widespread manner.²⁹² The courts continue to charge and convict people for committing low-level crimes that involve single instances of violence, such as armed robbery or illegal possession of weapons. These crimes do not fall under the definitions of genocide, crimes against humanity, war crimes or crimes of aggression. As a result, an individual who is convicted in a Sudanese court of one of these low-level crimes could still be prosecuted in the ICC for committing a war crime or crime against humanity.

²⁸⁹ Press Release, International Criminal Court prosecutor tells Security Council investigation into Darfur crimes initiated 1 June, U.N. SCOR, 5216th mtg., U.N. Doc. SC/8429, 1 (June 29, 2005). [Reproduced in the accompanying notebook at Tab 61].

²⁹⁰ *Id.*; see also *Report of the Prosecutor of the International Criminal Court, Mr. Luis Moreno Ocampo, to the Security Council*, pursuant to S.C. Res. 1592 (2005). [Reproduced in the accompanying notebook at Tab 23].

²⁹¹ *Id.*

²⁹² See generally ICI report [Reproduced in the accompanying notebook at Tab 22], *Human Rights Watch*, *Darfur Destroyed: Ethnic Cleansing by Government and Militia Forces in Western Sudan*, Vol. 16, No. 6(A), (May 2004) [Reproduced in the accompanying notebook at Tab 54]; AI report, *Darfur: No One To Complain To* [Reproduced in the accompanying notebook at Tab 48]; *Amnesty International*, *Sudan: Who will answer for the crimes?* [Reproduced in the accompanying notebook at Tab 51]; SHRO report [Reproduced in the accompanying notebook at Tab 65].

c. Under Article 17(1)(d), the case is of sufficient gravity to justify further action by the ICC.

The Rome Statute does not define “sufficient gravity” for the purpose of determining inadmissibility. Presumably, however, since a case would have to fall within the set of crimes over which the Court has jurisdiction – genocide, crimes against humanity, war crimes, and the crime of aggression – a case would have to be of at least minimum gravity to satisfy the definitions of those crimes.

There has been extensive documentation of the crimes committed since the conflict in Darfur began in 2002. The ICI estimated that thousands of civilians had been killed, over 1.6 million civilians had been forcibly displaced, thousands of women and children had been raped and hundreds of villages had been destroyed.²⁹³ Recent estimates of the casualties of the conflict have increased those numbers to nearly 180,000 people killed and more than 2 million people displaced.²⁹⁴ To date, the Sudanese judicial system has been ineffective at securing justice for the victims of these crimes. Therefore, Darfur is perfectly suited for admissibility to the ICC.

IV. CONCLUSIONS

Under Article 17 of the Rome Statute, the situation in Darfur is admissible to the ICC for prosecution. A case is only inadmissible to the ICC when a State is willing or able to genuinely prosecute, when a State has made a genuine decision not to prosecute, when an individual has already been convicted of a crime that falls under the ICC’s jurisdiction or when a case is not of sufficient gravity to warrant prosecution by the ICC.²⁹⁵

²⁹³ ICI report at 158. [Reproduced in the accompanying notebook at Tab 22].

²⁹⁴ *Situation in Sudan’s Darfur deteriorating sharply, says UN refugee agency chief*, U.N. NEWS CENTRE, Oct. 25, 2005. [Reproduced in the accompanying notebook at Tab 62].

²⁹⁵ Rome Statute, Art. 17. [Reproduced in the accompanying notebook at Tab 13].

The information that is available about the legal proceedings that have occurred suggests that the Sudanese Government is unwilling to genuinely prosecute individuals for alleged international crimes. There is evidence that the Government is attempting to shield the true perpetrators of crimes in Darfur from criminal responsibility by holding sham proceedings in which civilians and low-ranking soldiers are the only defendants. The Government's expansion of immunity to officers and soldiers for crimes committed in the course of their duties also suggests that prosecutions in Darfur are not being conducted impartially or in a manner consistent with justice. Even though numerous non-governmental organizations have concluded that the Government was heavily involved in the crimes that occurred in Darfur, no Government officials or militia leaders have been charged with crimes.

The Sudanese judicial system is unable to prosecute alleged perpetrators of crimes in Darfur. The unavailability of the judicial system stems from the failure of Sudanese criminal laws to encompass crimes of the nature of war crimes or crimes against humanity. In addition, the Courts that were created by the Government to address the need for prosecutions are grossly inadequate under international law. The decrees establishing the Special Courts, the Specialised Court and the Special War Crimes Courts contain provisions that result in unfair trials. The Courts are required to refer to the Criminal Code, the Criminal Procedure Act, the National Security Law and the Evidence Act when hearing cases. Each of these statutes has been shown to contain provisions that constitute serious violations of international law and that grant broad immunity to Government officials, security agents and members of the military. The Government, however, has taken no steps to implement national jurisdiction that would prohibit the commission of international crimes or allow for the prosecution of such crimes.

There is no evidence that the Sudan has investigated cases and made a decision not to prosecute those accused of committing war crimes or crimes against humanity in Darfur. Since the Government has demonstrated its unwillingness and inability to genuinely prosecute individuals, it cannot genuinely decide not to prosecute within the meaning of Article 17(1)(b) of the Rome Statute.

Due to the nature of the crimes for which individuals have been prosecuted in Darfur, there have been no prosecutions for crimes that fall within the jurisdiction of the ICC. The Sudan has made an effort to prosecute individuals for crimes committed in Darfur; however, the prosecutions have been for low-level crimes committed on an individual scale, rather than grave international crimes. Thus, the ICC could prosecute individuals for war crimes or crimes against humanity, even if they have already been prosecuted for a low-level crime in the Sudan.

Finally, the crimes that have been committed in Darfur since the initiation of the conflict in late 2002 leave no doubt that the situation is of sufficient gravity to merit prosecution by the ICC. The crimes committed in Darfur are of “international concern”²⁹⁶ and, as such, the ICC should assume jurisdiction over the matter.

²⁹⁶ Politi at 15. [Reproduced in the accompanying notebook at Tab 41].