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الفدرالية الدولية لحقوق الانسان

Khartoum Centre for Human Rights and Environmental Development (KCHRED)

Sudan Organisation Against Torture (SOAT)

Report

International Criminal Court Programme

SUDAN

The International Criminal Court and Sudan: Access to Justice and Victims' Rights

Roundtable, Khartoum, 2-3 October 2005

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Abbreviations

APIC: Agreement on Privileges and Immunities
ASP: Assembly of State Parties
ASPA: American Service Members' Protection Act
AU: African Union
BIA: Bilateral Immunity Agreement
CICC: Coalition for the International Criminal Court
DRC: Democratic Republic of the Congo
EU: European Union
FIDH: International Federation for Human Rights
ICC: International Criminal Court
ICJ: International Court of Justice
ICTR: International Criminal Tribunal for Rwanda
ICTY: International Criminal Tribunal for Former Yugoslavia
ILC: International Law Commission
IMT: International Military Tribunals (Nuremberg and Tokyo tribunals)
JCCD: Jurisdiction, Complementarity and Cooperation Division
KCHRED: Khartoum Center for Human Rights and Environmental Development
NGO: Non-governmental Organization
OTP: Office of the Prosecutor
RS: Rome Statute - Statute of the ICC
RPE: Rules of Procedure and Evidence of the ICC
SC: Security Council
SOAT: Sudan Organization Against Torture
UN: United Nations
VPRS: Victims Participation and Reparation Section
VTF: Victims Trust Fund
VWU: Victims and Witnesses Unit

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FOREWORD

The FIDH and the International Criminal Court (ICC)

Since 1998, following negotiations in Rome on the Statute for the International Criminal Court, the International Federation for Human Rights (FIDH) has worked for the implementation of an independent and impartial ICC to protect the rights of victims. Throughout the process of implementation, FIDH has worked to defend these principles.

Today, FIDH focuses on transforming the ICC into an effective tool to be used in the struggle against impunity for the gravest crimes committed in violation of international law.

The FIDH ICC Program

The FIDH program devoted to the International Criminal Court—"The struggle against impunity and the promotion of international justice"—has one primary global objective: to train and reinforce the capacity of national human rights NGOs to act in defense of human rights. The realization of this objective would permit these organizations to promote and *in fine* to utilize the mechanisms currently available in the struggle against impunity of those who commit the most serious crimes against human rights—one of the most important of such mechanisms being the ICC. This program benefits from the support of the European Commission (European Initiative for Democracy and Human Rights).

FIDH, in the context of the campaign for universal ratification of the Statute of the ICC, has chosen to focus its action on countries in Asia, North Africa, and the Middle East, regions in which very few states have ratified the Statute. Thus, in close collaboration with NGOs in the concerned countries, FIDH organizes international missions and other activities in the field, including the organization of roundtables, in support of its objectives.

SOAT - Sudan Organisation Against Torture

SOAT is an independent non-governmental human rights organisation established in 1993 working in Sudan and UK and has members worldwide. SOAT's primary objective is preventing torture and challenging impunity. SOAT works to rehabilitate Sudanese survivors of torture; provides legal assistance to survivors and individuals threatened with inhumane and degrading punishments; provides human rights education; researches, documents and campaigns against human rights abuses in Sudan on a national and inter-national level.

I - A BRIEF INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT (ICC)

1. Historic overview

On 17 July 1998, 120 States overwhelmingly approved a Statute to establish a permanent and independent International Criminal Court (ICC). Four years later, on 11 April 2002, following the 60th ratification, the Rome Statute (RS) of the ICC entered into force. On 1 July 2002, the ICC became fully competent to try individuals for genocide, crimes against humanity and war crimes.

The "road to Rome" was a long and often contentious one. Efforts to create a global criminal court can be traced back to the early 19th century. The story began in 1872 with Gustav Moynier—one of the founders of the International Committee of the Red Cross—who proposed a permanent court in response to the crimes of the Franco-Prussian War.

Following World War II, the Allies set up the Nuremberg and Tokyo tribunals to try Axis war criminals.

Because of the Cold war, 50 years passed before the world's leaders decided to put the ICC on their agenda again.

Nonetheless, efforts were made in the 90's to develop a system of international criminal justice with the establishment by the UN Security Council of the ad hoc tribunals, the International Criminal Tribunal for Former Yugoslavia (ICTY) in 1993 and the International Criminal Tribunal for Rwanda (ICTR) in 1994, and the creation of hybrid tribunals, like the Special Tribunal for Sierra Leone, the Khmer Rouge Tribunal in Cambodia and the Tribunal for East Timor, applying a combination of international and national law.

2. The ICC is permanent and complementary to national justice

Permanent jurisdiction

Unlike the ad hoc tribunals, which have jurisdiction over core crimes committed in Former Yugoslavia from 1991 to 1993 and in Rwanda in 1994, and the hybrid tribunals, the ICC has jurisdiction with respect to crimes committed after the entry into force of the Rome Statute, that is after 1st of July 2002. This means that the ICC cannot try individuals for crimes committed before this date and thus has a non-retroactive jurisdiction.

Complementary jurisdiction

The ICC is complementary to national criminal jurisdictions and does not replace national courts. The Court will only investigate and prosecute if a State is unwilling or unable to genuinely prosecute (i.e. where there are unjustified delays in proceedings, as well as proceedings which are intended merely to shield persons from criminal responsibility).

3. How to refer a situation to the ICC

There are three ways to refer a situation to the ICC Prosecutor:
- **State Party** referral; a Non State Party may also accept the jurisdiction of the Court.
- United Nations **Security Council** referral under Chapter VII of the UN Charter
- Any person can refer a situation to the **Prosecutor** who, pursuant to his ***propio motu*** prerogative, can decide to initiate an investigation, if he believes that there is "reasonable basis" to investigate. He must then seek the authorization of the Pre-Trial Chamber before proceeding with the investigation.

4. Jurisdiction of the ICC

The ICC has jurisdiction to prosecute **individuals** of crimes under the Rome Statute when:
- crimes have been committed in the **territory** of a State which has ratified the Rome Statute;
- crimes have been committed by a **citizen** of a State which has ratified or made a ad hoc referral to the Rome Statute;
- the Security Council refers a situation to the ICC. In such a case the Court's jurisdiction is truly universal, meaning that it is not necessary for the alleged perpetrator of the crime to be citizen of a State Party or for the crime to have been committed on the territory of a State Party.

Since **1 July 2002**, the Court has jurisdiction over the crime of genocide, crimes against humanity and war crimes. The Court will exercise jurisdiction over the crime of aggression only once the terms of its definition have been agreed upon.

If a State becomes a Party to the Rome Statute after July 2002, the Rome Statute will enter into force for this State **60 days** after the deposit of its instrument of ratification.

5. Core crimes defined in the Statute of the ICC

What crimes fall under the jurisdiction of the International Criminal Court?

The ICC has jurisdiction over the most serious violations of international human rights and humanitarian law: genocide, crimes against humanity, war crimes.

Genocide (Article 6 RS)

The definition of the crime of genocide has been taken from the 1948 Genocide Convention. Genocide is any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group:
- Killing members of the group
- Causing serious bodily or mental harm to members of the group
- Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part
- Imposing measures intended to prevent births within the group
- Forcibly transferring children of the group to another group.

Crimes Against Humanity (Article 7 RS)

The Rome Statute is the first international convention which codifies crimes against humanity.

Crimes against humanity are defined as any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:
- Murder
- Extermination
- Enslavement
- Deportation or forcible transfer of population
- Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law
- Torture
- Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity
- Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender, or other grounds that are universally recognized as impermissible under international law
- Enforced disappearance of persons
- The crime of apartheid
- Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health. (...)

War Crimes (Article 8 RS)

Under the Rome Statute, war crimes are any of the following grave breeches of the Geneva Conventions of 12 August 1949, perpetrated against any persons or property:
- Willful killing
- Torture or inhuman treatment, including biological experiments
- Willfully causing great suffering, or serious injury to body or health
- Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly
- Compelling a prisoner of war or other protected person to serve in the forces of a hostile power
- Willfully depriving a prisoner of war or other protected person of the rights of fair and regular trial
- Unlawful deportation or transfer or unlawful confinement
- Taking of hostages.

Under the definition of war crimes, the Court will also have jurisdiction over the most serious violations of the laws and customs applicable in international armed conflict within the established framework of international law. These violations are defined extensively in Article 8, subparagraph (b) of the Rome Statue In the case of armed conflict not of an international character, the Court's jurisdiction will cover breeches of Article 3 common to the four Geneva Conventions of 12 August 1949.

Crime of Aggression

The Court will have jurisdiction over the crime of aggression once a provision defining the crime has been adopted during the Review conference in 2009.

The **applicable law of the ICC** (the sources) is primarily the Rome Statute (RS), the Elements of Crimes and the Rules of Procedure and Evidence (RPE) (article 21).

6. General principles of criminal law

Individual criminal responsibility (Article 25 RS)

The ICC has jurisdiction over individuals and not legal entities, such as multinationals or corporations.

Minimum age for ICC jurisdiction (Article 26 RS)

The ICC only has jurisdiction over individuals of 18 years of age or older.

Non-retroactivity (Article 24 RS)

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

Command responsibility (Article 28 RS)

Commanders, from the military as well as other superiors, can be tried where they knew or should have known that their subordinates were committing crimes within the jurisdiction of the ICC, when they failed to take necessary measures to prevent or repress their commission and, for other superiors, when the crimes concerned activities that were within their effective responsibility and control.

***Ne Bis In Idem* (Article 20 RS)**

No person shall be tried by another court for a crime referred to in article 5 for which that person has already been convicted or acquitted by the Court. No person who has been tried by another court for conduct also proscribed under article 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court were for the purpose of shielding the person concerned from criminal responsibility or were not conducted independently or impartially in accordance with the norms of due process recognized by international law.

Irrelevance of official capacity (Article 27)

The Rome Statute applies equally to all persons without any distinction based on official capacity. Immunities that may apply under national or international law are not applicable before the ICC.

7. Sentences

The ICC does not recognize the death penalty and can impose a maximum penalty of 30 years of imprisonment or a term of life imprisonment when justified by the extreme gravity of the crime. In addition to imprisonment, the ICC can order a fine or a forfeiture of proceed, property and assets.

8. Organization of the Court

There are four organs within the ICC:
- The Presidency, composed of the President, Mr. Philippe Kirsch (Canada), and two Vice-Presidents;
- The Chambers, divided into Pre-Trial Chambers, Trial-Chambers and Appeals Chambers and composed of 18 judges, elected by the Assembly of State Parties;
- The Office of the Prosecutor, composed of the Prosecutor, Mr. Luis Moreno Ocampo (Argentina), elected by the Assembly of State Parties, two Deputy Prosecutors, Mr. Serge Brammertz (Belgium) and Mrs. Fatou Bensouda (Gambia), also elected by the Assembly of States Parties;
- The Registry, headed by the Registrar, Mr. Bruno Cathala (France), elected by the Assembly of State Parties.

9. Victims rights

Victims' access to international criminal justice is new. Indeed, for a long time, the interests of victims were not considered in international law. In Nuremberg in 1945 as well as before the international criminal tribunals created in 1993 and 1994 (International Criminal Tribunal for Former Yugoslavia–ICTY– and International Criminal Tribunal for Rwanda–ICTR) the victim is only considered as a witness.

The Statute of the ICC consecrates the statute of the victim in international law. It includes innovating provisions enabling the protection, participation, legal representation and the reparation of victims.

Wide definition of "victim"

The Statute of the ICC includes in the definition of victims not only direct victims but also indirect victims. Moreover, psychological harm is recognized next to physical harm. Only natural persons are recognized as victims before the ICC.

Protection of Victims and members of their family

Another progressive aspect of the ICC is the obligation of protection of victims-witnesses, during the investigation phase as well as during the proceedings. Victims and witnesses have the right to physical protection, but also to receive psychological assistance from all the organs of the Court.

Effective participation

Beyond the possibility of supplying information to investigations, victims can participate in the proceedings before the ICC, provided that they are effectively informed of their rights and are fairly represented. Having been informed of the consequences, modalities and limits of the participation to the proceedings before the ICC, victims are free to choose counsel of their choice. If there is a large number of victims, they will generally have to choose a common legal representative, for whose remuneration they can receive financial assistance from the ICC–within the limits defined by the Court.

Reparation

Unlike the ad hoc tribunals, the ICC establishes a real system of reparation for victims. The Court may determine the scope and extent of any damage to be repaired by the convicted person to the victims or their beneficiaries (restitution, compensation or rehabilitation), without the need for any specific request. If reparation cannot be paid directly by the convicted person, the Victims' Trust Fund, a subsidiary organ of the ICC, assists. The funds collected by the Trust Fund will come from forfeitures and fines ordered by the Court against convicted persons, as well as from voluntary contributions from States, individuals and organizations.

II - INTRODUCTION: THE SECURITY COUNCIL'S REFERRAL OF THE DARFUR SITUATION TO THE INTERNATIONAL CRIMINAL COURT

The International Criminal Court (hereinafter, "the Court" or "the ICC") was set up to deal with war crimes, crimes against humanity and crime of genocide, committed on the territory or by nationals of States Parties to its Statute, signed in Rome in 1998 (the Statute entered into force on 1 July 2002). At the moment of writing, there are 100 States Parties to the Statute.

1. Summary of events prior to the referral

Sudan signed the Rome Statute on 8 September 2000 but did not ratify it.

However, the Court is competent to consider situations that occurred on the territory of a State which is not a Party to the Statute provided that the case is referred to the Court by the UN Security Council acting under Chapter VII[1] of the Charter of the United Nations. Currently, the Office of the Prosecutor is investigating three cases: Democratic Republic of Congo, Uganda and Sudan, the latter case having been referred to the Court by the Security Council.

In response to the events in the Darfur region of Sudan, the UN Secretary General in September 2004 appointed an International Commission of Inquiry presided by Prof. Antonio Cassese. The Commission's Report, published on 25 January 2005 (Doc. S/2005/60), recommended, *inter alia*, that the situation in the region of Darfur be referred to the Court because of the grounds that were substantial evidence to believe that crimes against humanity and war crimes had been committed since 2003. Furthermore it was considered that the Sudanese judiciary was unwilling to prosecute the alleged perpetrators.[2]

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Press release

Sudan Organisation Against Torture
SOAT

Darfur: The FIDH calls on the Security Council to refer the matter to the ICC

Paris, 1 February 2005 - The report of the international commission of inquiry, mandated by the UN Security Council, published on 31 January, qualifies the crimes committed in Darfur as war crimes and crimes against humanity, and recommends their referral to the International Criminal Court (ICC). The FIDH welcomes these conclusions. As early as September 2004 the FIDH considered that it was incumbent on the Security Council to refer the situation in Darfur to the Prosecutor of the International Criminal Court, in accordance with art. 13 b) of the Statute of Rome.

[...] Sudan not having ratified the Statute of the International Criminal Court, the only alternative is for the Security Council itself to activate the Court. The ICC would be the only body capable of responding to the expectations of the victims, who for the first time in the history of international criminal justice can take an active part in the Court's proceedings. Lastly, a strong commitment on the part of the Security Council in favour of the ICC would give the United States the opportunity to revise their hostility to the ICC, by supporting the fundamental rights of the victims to effective international justice.

The FIDH reminds the other member States of the Security Council that it would not be acceptable to buy the approval of the American administration with immunity granted to its citizens. The reactivation of the American exception granted in 2002 and 2003 by the Security Council in its resolutions 1422 and 1487 would be disastrous. The seriousness of the crimes committed in Darfour calls for a firm response against impunity.

The members of the United Nations Security Council must refer the situation in Darfur to the ICC: there is no other possible alternative!

1. Chapter VII: "Action with respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression"
2. See Report of the International Commission of Inquiry on Darfur to the United Nations Security Council', Section 572 and 608.

2. The Security Council's referral

In March 2005, Nigeria, acting on behalf of member states of the African Union and in its capacity as the president of the AU, proposed the creation of "*The African Panel for Criminal Justice and Reconciliation*" to prosecute "the alleged violations of human rights and war crimes in Darfur". This proposal, though supported by the Government of Sudan, was rejected together with several other proposals, including that of the USA to extend the mandate of the International Criminal Tribunal for Rwanda to consider the crimes in Darfur.

On 31 March 2005, the Security Council adopted Resolution 1593 (2005) and for the first time in its history referred a case, that of the Darfur region, to the Court (China, the USA, Algeria and Brazil abstained from voting). The Security Council, having taken note of the Cassese Commission's Report, *inter alia*,

- decided that Sudan and all other parties to conflict in Darfur should fully cooperate with the Court and the Prosecutor;
- invited the Court and the AU to discuss practical agreements that would facilitate the work of the Prosecutor and the Court, including the possibilities of conducting proceedings in the region.

However, US opposition to the Court can be read between the lines of the Resolution:

- the Resolution refers to bilateral immunity agreements ("agreement referred to in Article 98(2) of the Rome Statute"), concluded by the US with several third parties;
- the Security Council decided that "*nationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to operations in Sudan established or authorized by the Council or the African Union, unless such exclusive jurisdiction has been expressly waived by that contributing State*";
- the Resolution recognized that "*none of the expenses incurred in connection with the referral including expenses related to investigations or prosecutions in connection with that referral, shall be borne by the United Nations and that such costs shall be borne by the parties to the Rome Statute and those States that wish to contribute voluntarily*".

3. Opening of the investigation

The Prosecutor of the Court, Mr. L. Moreno Ocampo, received the case-file of the Cassese Commission consisting of more than 5000 documents, including a sealed envelope with 51 names of persons whose criminal responsibility may be engaged. On 6 June 2005 the Prosecutor concluded that the requirements of the Statute for initiating an investigation[3] had been fulfilled. The Office of the Prosecutor noted that the investigation would focus "on the individuals who bear the greatest criminal responsibility for crimes committed in Darfur".[4] He also announced that he will not be bound by the 51 names of persons contained in the sealed envelope that had been passed to him.

On 29 June 2005, in his statement to the Security Council, pursuant to Resolution 1593, the Prosecutor provided some clarification on the conditions concerning the opening of the investigation in the Darfur case :[5]

- *as regards crimes falling into the jurisdiction of the Court:* there is significant amount of credible information disclosing the commission of grave crimes within the jurisdiction of the Court having taken place in Darfur; these crimes include the killing of thousands of civilians, the widespread destruction and looting of villages, leading to the displacement of approximately 1.9 million civilians; the conditions of life resulting from these crimes have led to the deaths of tens of thousands from disease and starvation, particularly affecting vulnerable groups such as children, the sick and the elderly; information also highlights a pervasive pattern of rape and sexual violence;

- *as regards admissibility of the case:* the Office has studied Sudanese institutions, laws and procedures, sought information on any national proceedings that may have been undertaken in relation to crimes in Darfur, and also analyzed the multiple *ad hoc* mechanisms that were created by the Sudanese authorities in 2004 in the context of the conflict in Darfur, including the Committees against Rape, the Special Courts and the Specialized Courts that replaced them, the National Commission of Inquiry and other ad hoc judicial

3. Article 53 of the Statute.
4. The Prosecutor of the ICC opens investigation in Darfur, Press-release of 6 June 2005, Doc. OTP/LSU/066-05, http://www.icc-cpi.int/press/pressreleases/107.html.
5. Statement of the Prosecutor of the International Criminal Court Mr. Luis Moreno Ocampo to the Security Council on 29 June 2005 pursuant to the UN Security Council Resolution 1593 (2005), http://www.icc-cpi.int/library/cases/LMO_UNSC_On_DARFUR-EN.pdf

committees and non judicial mechanisms; following this analysis, the Prosecutor is determined that there are cases that would be admissible in relation to the Darfur situation; this decision does not represent a determination on the Sudanese legal system as such, but is essentially a result of the absence of criminal proceedings related to the cases on which he will focus;

- *as regards the interests of justice:* the Prosecutor examined the relevant issues, including traditional mechanisms for justice and reconciliation, and decided to pursue the investigation.

According to the Rules of the Court, once a situation is referred to the Prosecutor, he must inform the Presidency of the Court, which assigns the case to a Pre-Trial Chamber. In the present case, the Prosecutor's letter is dated 4 April 2005, and the Pre-Trial Chamber I, to which the case was assigned, was constituted on 21 April 2005.

Press release/The Security Council refers the Darfur situation to the ICC

April 4, 2005 - A historical precedent against the impunity of perpetrators of crimes against humanity and in support of the millions of victims in Darfur

The International Federation for Human Rights (FIDH) and its member organization, the Sudan Organization against Torture (SOAT), welcome the referral to the International Criminal Court (ICC) of the Darfur situation by the Security Council, a historical precedent they have been advocating for since September 2004. The FIDH and SOAT point out that although the ICC is "complementary" to national jurisdictions, the fact that the Security Council brought this matter to the ICC implicitly indicates that the ICC has primacy in prosecuting the suspects: the Sudanese authorities will thus have to abide by the resolution of the U.N. political body. This referral sends a clear message to perpetrators of ongoing crimes against humanity in Darfur: they will be held accountable for their crimes. The court also has a responsibility upstream of the judicial process to contribute to silencing the weapons.

However, the FIDH and SOAT strongly regret the shameful bargaining that accompanied the vote of the Security Council resolution. This resolution stipulates that nationals of States that are not parties to the ICC Statute but are participating in any Security Council or African Union operation and would be suspected of having committed international crimes in Darfur would be exclusively prosecuted before their own domestic courts. This measure is specially designed to guarantee the impunity of American nationals and to satisfy the USA's paranoiac distrust of the ICC. It creates a double standard in matters of justice and violates international law, including the Rome Statute that established the ICC, as well as obligations, accepted by a majority of States, which recognizes the extraterritorial jurisdiction of their national tribunals.

The FIDH and SOAT also deplore the reference made in the preamble to the resolution to the bilateral "impunity" agreements which the U.S. signed with various States under the fallacious basis of Article 98-2 of the Rome Statute. By referring to "the existence of agreements referred to in Article 98-2 of the Rome Statute", the Security Council risks to legitimate these impunity agreements. According to the FIDH and SOAT, these provisions will in no way be binding on the ICC, which will have to assess their legality.

The resolution also encourages the creation of "truth and/or reconciliation commissions, in order to complement judicial processes and thereby reinforce the efforts to restore long-lasting peace." The FIDH and SOAT recognize that such an initiative will contribute to building up peace in Sudan as long as it does not lead to impunity for the perpetrators of crimes who would not be prosecuted by the ICC.

Finally, the FIDH and SOAT deplore the fact that the Security Council refuses to give the ICC the means to take action. Indeed, the Security Council has decided not to support the financial cost of this referral, in flagrant violation of article 115b of the Statute, which makes it an obligation for the United Nations, and consequently puts the duty of financing costs relating to this referral on the 98 States Parties to the Rome Statute. If the States Parties to the Statute refuse to shoulder their obligations and to significantly increase the Court's present budget, this means that the whole international community would, once again, abandon the victims of Darfur, thus increasing insecurity and the impunity enjoyed by the perpetrators of the most frightful crimes.

.../...

.../...

<u>The FIDH and SOAT recommend</u>:

To the Sudanese Government

- to take note of the Security Council's Resolution;
- to cooperate with the Court in accordance with article 87.5 of the Statute;
- to cooperate fully with the staff of the ICC.

To the International Community, the Security Council and the African Union

- to give financial support to the investigations and other activities of the ICC;
- to cooperate fully with the investigations of the ICC's Prosecutor;
- to support the setting up of institutions aiming to rebuild the country without allowing impunity.

To the States Parties to the Rome Statute

- to increase significantly the budget of the ICC so that it can efficiently fulfill its mandate in Darfur, but also in other situations under analysis, in order to allow the implementation of a genuinely impartial and universal system of justice;
- to cooperate with all the organs of the Court so that their mandates may be implemented effectively.

To the International Criminal Court

- to the Prosecutor: to immediately open an investigation into the crimes committed in Darfur;
- to the Registrar: to inform the civilian population of the Court's mandate and activities, to inform the victims and witnesses of their specific rights according to the Statue of the Court, and especially the right of victims to participate in proceedings; to establish programs for the protection of victims and witnesses;
- To all the organs of the Court not to use budgetary considerations limiting the number of situations, which the Court can investigate.

4. Principal challenges and difficulties in the implementation of the Security Council's referral

- Cooperation between the Court and the Sudanese authorities, the African Union and the United Nations

It should be recalled that in Resolution 1593 the Security Council notes that, "while recognizing that the States not party to the Rome Statute have no obligations under the Statute, urges all States and concerned regional and other international organizations to cooperate fully".

Speaking before the Security Council on 29 June 2005, Mr. Moreno Ocampo indicated that he had not made any specific requests for cooperation at the stage of preliminary analysis. He declared that he had two meetings in The Hague with officials of the Government of Sudan and that the Government of Sudan has provided information on the Sudanese legal and judicial system, as well as on the "traditional mechanisms of reconciliation".

In 2004, the Court began negotiating an agreement regulating its relations with the AU, with the aim of finalizing it by April 2005. On 20 May 2005, the Prosecutor met Mr. Obassanjo, the President of Nigeria, and president of the AU.

- Financial resources

SC Resolution 1593 notes that the costs of the referral, including those of the investigation and prosecution, would not be borne by the UN and that the resources should be contributed by the States Parties to the Statute and by those States who willing contribute on a voluntary basis. This has been done notwithstanding Article 115(b) of the Statute, which stipulates that the expenses of the Court shall be provided, inter alia, by the funds of the United Nations, subject to approval of the General Assembly, in particular in relation to the expenses incurred due to referrals of the Security Council.

- Complementarity between the Court and the Sudanese judicial system

As a preliminary point the question should be raised whether the principle of complementarity, as provided for by the Statute, applies to the referrals of the Security Council, or

whether the latter are subject to a derogatory regime. Two arguments may be put forward to support the second position: firstly, the admissibility criteria of territory or nationality of the State Party do not apply to SC referrals; and, secondly, the SC referral itself may well present recognition of inability and unwillingness of the national judicial system concerned to prosecute and punish the alleged perpetrators of crimes falling into the jurisdiction of the Court.

The Sudanese authorities have created different mechanisms in respect of the Darfur region, e.g., a committee against rape was instituted by a ministerial decree of 2004, specialized tribunals, which were later replaced, under a ministerial decree of 2004, by a national inquiry commission etc.

Following the Prosecutor's decision to open the investigation, the Government of Sudan submitted information to the Office of the Prosecutor relating to establishment of a new Special Court, whose task was to try the alleged perpetrators of crimes in Darfur.

According to a letter dated 18 June 2005 from the Permanent Mission of Sudan to the UN to the President of the Security Council, following the activities of the National Inquiry Commission, the Minister of Justice created, on 7 June 2005, the Special Court for events in Darfur.[6] The legal basis for its creation was the decree no. 702, adopted by the Minister of Justice, Mr. Jalal-el-Din Mohamed Osman, in accordance with article 10(e) of the Council of Judiciary Act of 1986 and with articles 6 and 14 of the Criminal Procedure Act of 1991.

The Special Court is composed of one judge of the Supreme Court and two judges from the Court of Appeal. It is competent to hear cases concerning, in particular, crimes as defined in the Sudanese Penal Code and crimes referred to by the National Commission of Inquiry. According to the procedure before it, in theory an accused should be informed of charges against him at least 72 hours in advance of the hearing, the accused has the right to be represented by a lawyer, hearings are public unless the Special Court decides otherwise, and appeal is possible before a special court of appeal, which is to be created by the Minister of Justice.

The seat of the Special court is in the Darfur region, in Nyala and El Fashir. It has heard 6 cases between June and October 2005. The Sudanese Ambassador to the UN suggested on 29 June 2005 that the delegation of the ICC may observe trials before the Special Court in order to ensure transparency.

Does this Special Court satisfy the requirements of Article 17 of the Rome Statute and thus prevent further action by the ICC Prosecutor and the ICC in deference to national criminal proceedings? The answer is negative, even bearing in mind that the Minister of Justice established on 8 September 2005 the Special Attorney Office for Crimes against Humanity in conformity with the definition of crimes against humanity given in the Criminal Procedure Act of 1991.

There are five major concerns regarding the Darfur Special Court created following the Security Council referral:
1. The substantive jurisdiction of the Court, which does not specifically refer to the Rome Statute crimes
2. The stringent evidentially burden
3. Immunity from prosecution, including for all police and military forces
4. No fair trial guarantees, in particular regarding the lack of access, in practice, to legal representation and the treatment of confessions during trial
5. Protection of victims

Further, the Security Council in paragraph 5 of Resolution 1593 emphasized "the need to promote healing and reconciliation" and, in this respect, encourages "the creation of institutions, involving all sectors of the Sudanese society". One possible institution is a commission on truth and reconciliation, which would complement judicial actions and reinforce attempts to achieve peace. Having announced the opening of the investigation, Mr. Moreno Ocampo declared that the "traditional African mechanisms can be an important tool to complement [the efforts of international community to end violence] and achieve local reconciliation".[7] Minimum conditions should be met however, to ensure prima facie credibility to such mechanism.

In this overall context, FIDH, SOAT and their local partners, considered the opportunity to organize in Khartoum, a roundtable on the ICC and Sudan with a view to contribute to:

- outreaching on the ICC on the basic principles its system lays on, in particular the crimes under its jurisdiction, the complementarity principle and the rights of victims;

6. S/2005/403 22 June 2005.
7. http://www.icc-cpi.int/pressrelease_details&id=107.html

- training on the ICC issues of Sudanese human rights defenders working on the situation in Darfur;

- the discussion between human rights NGOs and the authorities on the situation.

The cooperation with the authorities which participated actively to the seminar; the wide and very dynamic involvement of Sudanese human rights defenders in the seminar; and the important place in the media of the seminar made it an important and -at that time- unprecedented outreach step in Karthoum about the Darfur case at the ICC. The roundtable in this regard met its objectives and constitutes one step in favor of ratification and implementation of the Rome Statute.

III - OPENING CEREMONY

1. Dr. Abdelmon'im Osman Mohamed Taha, Advisory Council for Human Rights

Dr. Abdelmon'im Osman Mohamed Taha, Advisory Council for Human Rights

I warmly welcome the participants from inside the country and from abroad, namely the International Federation for Human Rights (FIDH) and the Coalition for the International Criminal Court (CICC). I hope that international civil society organizations can maintain objective, neutral and independent stances over the bias of international power balances and political conflicts. In fact, it is exactly such neutrality that signifies international humanitarian law. Sudan is committed to its obligations under international law and therefore every effort from civil society organizations that is sincere and credible is much appreciated. The workshop comes at a time in which Sudan is undergoing a grand transformation marked by the Comprehensive Peace Agreement (CPA) and the Interim Constitution, a transformation that all the Sudanese wish to be both politically and economically conducive, and one in which human rights are a major instrument. The CPA put an end to one of the longest wars in the continent. Today the enemies have become partners. Furthermore, it recognized the right of self- determination for Southern Sudan; and I really question whether a lot of countries in the world would dare such an undertaking!

The CPA presents a suitable framework for a peaceful resolution of the conflict in Darfur, thus the international community should exert sufficient pressure on all parties to reach such a resolution, and only then will there be firm ground for the exercise of the principle of accountability.

2. Mr. Ian Cliff, British Ambassador to Sudan, on behalf of the European Union

The establishment of the International Criminal Court is a major landmark in the development of international justice, enshrining the principle of individual responsibility for war crimes, genocide and other crimes against humanity. The European Union (EU) has been, and remains a firm supporter of the ICC. A strong International Criminal Court, with global membership and jurisdiction, can help bring an end to the culture of impunity for these most repugnant crimes.

Since the Court became reality it has received several referrals and is formally investigating three situations. One of those is of course Darfur and one relates to the Lord's Resistance Army. In the past couple of weeks appalling events have shown why a climate of impunity cannot be allowed to persist either in Darfur or on the borders of Equatoria and North Uganda. The individuals responsible have to be brought to justice.

The EU believes that, to reach its full potential, the ICC must be truly universal. This will give the Court the widest possible jurisdiction and enhance its legitimacy as a multilateral institution. EU member States are therefore pledged to promote the widest possible participation to the Rome Statute.

The EU, therefore, hopes to see a much broader participation by the states of the region. It is our responsibility to see a firmly entrenched international system of justice to deal with war crimes, genocide and crimes against humanity, and also to promote respect for international humanitarian law and human rights.

In June 2003 the EU adopted a Common position in support of the ICC and has drawn up an action plan which was renewed in February 2004. The plan outlines practical steps that the EU and its member states should take in support of the Court. These include:

- The setting up of an EU Working Party which meets regularly to coordinate EU activities in support of the Court;

- The EU and some member states are providing financial support for training needs at the Court, in particular in training of interns from a broad range of states;

- The EU undertakes an active lobbying campaign to encourage states parties to put in place the implementing legislation necessary to fulfill their obligations under the ICC Statute. It lobbies non-signatory states to ratify the Statute in order to obtain the widest possible jurisdiction for the Court. It also undertakes lobbying in those states which are considering the signature of Bilateral Immunity Agreements (BIA) which risk undermining states parties obligations under the ICC Statute.

- EU member states regularly give financial and other assistance to workshops, courses, symposiums and conferences aimed at furthering the universality of implementation of the ICC Statute.

- The EU is currently negotiating a cooperation agreement with the Court which will allow it to share information and to extend practical assistance to the Court as it undertakes investigations in the field.

The EU is convinced that the ICC will make the world a safer, more just and more peaceful place in which to live. We believe that, though its existence, the ICC will deter individuals from committing the most heinous crimes, and through ending impunity, the ICC will strengthen the primacy of the rule of law.

3. Dr. Nagib, SOAT, Khartoum Center for Human Rights and Environmental Development

We need to increase our knowledge in all fields and particularly in regard to rights and constitutional matters. Since the ICC has become reality, it has transformed the individual into a subject of international law. Whether Sudan ratifies the Statute or not does not mean much in the face of the society's convictions and prejudices. We need to establish a social legal institution that will assist all in articulating the injustices they have suffered and in finding the appropriate mechanisms to achieve justice.

IV - SESSION 1 : THE LAW OF THE INTERNATIONAL CRIMINAL COURT

1. Historical overview of the ICC and the system of the ICC: jurisdiction, complementarity and trigger mechanisms

Mr. Hafez Abu Seada, President of the Egyptian Organization for Human Rights, FIDH Permanent Delegate before the League of Arab States

Mr. Hafez Abu Seada, President of the Egyptian Organisation for Human Rights, FIDH Permanent Delegate before the League of Arab States

The establishment of the ICC is a dream that has long occupied the international community. The aftermath of World War II witnessed the creation of the first international criminal tribunals: Tokyo and Nuremberg with the objective of prosecuting the atrocities committed during the war. The intention to establish an international criminal court came up as soon as 1946 but the cold war made it virtually impossible for the international community to agree on such an institution. However, the International Law Commission (ILC) (1951-53),- a body of experts nominated by the United Nations General Assembly and charged with the codification and progressive development of international humanitarian law - was mandated to draft the statute of an international criminal court derived from article IV of the Genocide Convention for the sake of maintaining international peace and security enshrined in the United Nation's Charter. The General Assembly requested the ILC to revive work on its draft code of crimes against peace and security. The turmoil in the former Yugoslavia following the Cold War constituted a benchmark in the history of the ICC. The Security Council decided to establish a tribunal mandated to prosecute persons responsible for serious violations of international humanitarian law committed on the territory of the former Yugoslavia and in Rwanda.

Debates continued during 1996 -1997 inside the Commission and the United Nations until, pursuant to General Assembly resolutions, a conference of plenipotentiaries on the establishment of an international criminal court was convened in 1998, eventually shaping up the Rome Statute.

The creation of the ICC opened a debate on delicate issues such as determination of jurisdiction and the conflict between the international criminal system and national legal systems. But it was finally agreed that the ICC will be governed by the principle of complementarity, as stated in the last paragraph of the Preamble which emphasizes that the ICC '*shall be complementary to national criminal jurisdictions*'.

The Court shall determine that a case is inadmissible if it is being investigated or prosecuted by a State, which has power of jurisdiction, unless the State, which has ratified the Statute, is unwilling, or unable to genuinely carry out the investigation or prosecution.[8] Where the national legal system of the State in question does not contain a clear definition of the crimes under the jurisdiction of the Court, there is a possibility that perpetrators may escape prosecution, and therefore the ICC maintains jurisdiction despite the primacy of the national judiciary.[9] The State must have both the ability and the willingness to prosecute the crimes under jurisdiction of the Court.[10] For example the Lebanese State had the willingness to investigate the assassination of President Hariri, however, it did not have the necessary ability and for that reason requested the assistance of an international commission of investigation.

A case may be referred to the Court by the Security Council or by a State Party; the Prosecutor may also initiate investigations *proprio motu*.[11] The third method opens the

8. Article 17(1)(a) of the Statute.
9. Such conclusion may be reached by interpretation of Article 17(3) of the Statute, which provides as follows: "In order to determine inability [of the State to prosecute the alleged perpetrators of crimes within the Court's jurisdiction] in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence or testimony or otherwise unable to carry out its proceedings".
10. Willingness and ability of the State to prosecute shall be considered by the Court in every case before it in accordance with the criteria laid down in Article 17(2)-(3) of the Statute.
11. Article 13 of the Statute; Articles 14 and 15 of the Statute contain more detailed provisions on the State referrals and investigations initiated by the Prosecutor proprio motu respectively.

door to civil society organizations to forward information to the Prosecutor.
Acceptance and ratification of a Statute is however not a condition for referral by the Security Council, and therefore the Prosecutor can immediately start investigation upon referral of a situation from the Security Council. On the other hand, the ICC shall determine a case inadmissible where:
- The case is being investigated or prosecuted by a State, which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
- The case has been investigated by a State, which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
- The person concerned has already been tried for conduct, which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3, of the Statute ;[12]
- The case is not of sufficient gravity to justify further action by the Court.[13]

These clauses confirm the fact that the ICC is not intended to breach the sovereignty of States, but rather to complement national judiciary systems, which maintain primacy and priority over the Court.

2. Crimes within the jurisdiction of the International Criminal Court and General principles of criminal law[14]

Mr. Marceau Sivieude, FIDH Africa Program Director

- Crimes within the jurisdiction of the ICC

The International Criminal Court was set up to deal with the "*most serious crimes of concern to the international community*".[15] As many crimes could meet such criteria, at the Rome conference in 1998, where States were to adopt the ICC Statute, the drafters were still negotiating on which crimes would fall within the jurisdiction of the Court.

Some States were in favor of introducing the crime of terrorism as being part of the jurisdiction of the ICC. But at that time, there were no comprehensive definition of this crime in international law and the international community was not as focused on war on terrorism as it is now after September 11, 2001.

Other States were also considering the inclusion of the crime of drug trafficking within the jurisdiction of the Court. But, the delegations were aware that - because of the magnitude of the problem and of the complex investigations that are required in that matter - it would have undermined the functioning of the ICC with regard its limited resources.

Finally, the delegations agreed on the 4 crimes, which fall within the jurisdiction of the Court as stated in Article 5 of the Statute:
- Genocide;
- Crimes against Humanity;
- War crimes;
- Crime of Aggression.

But, looking at article 5.2 of the Statute, it is noteworthy that the Court has to date only jurisdiction over the three first listed crimes. Indeed, at the time of the negotiations, many countries - notably the Arab States - considered that the crime of aggression should be part of the jurisdiction of the Court, as being the "crime against peace". Two problems arose from the negotiations: First, States did not find a definition of an act of aggression. Second, some countries considered that, in line with the United Nations (UN) Charter and the mandate it gives to the Security Council (SC), only the SC has the authority to find that an act of aggression has occurred. If this is agreed, then such a finding by the SC would be required before the ICC itself could take any action. But, other

12. Article 20(3) of the Statute provides for two exceptions from the principle ne bis in idem where the proceedings in the other court (a) were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or (b) otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with the intention to bring the person concerned to justice.
13. Article 17(1)(a)-(d) of the Statute.
14. References :
- ICC documents : Statute of the International Criminal Court and Elements of Crimes
- Chérif Bassiouni - Crimes against Humanity in International Criminal Law, Martinus Nijhoff Publishers
- Emmanuel Ascensio, Emmanuel Decaux, Alain Pellet - Droit international pénal - CEDIN, Paris X, Editions A. Pedone
- The International Criminal Court, Elements of the crimes and Rules of Procedure and Evidence, Edited by Roy S. Lee
- Web site of the Coalition for the International Criminal Court : http://www.iccnow.org/
- Amnesty International - The International Criminal Court - Fact Sheets : http://web.amnesty.org/pages/icc-factsheets-eng
15. See Preamble of the ICC Statute.

countries considered that such authority should not be limited to the Security Council. There were proposals under consideration that would give that role to the UN General Assembly or to the International Court of Justice, if an accusation of aggression were made and the Security Council did not act within a certain time.

Failing to reach a consensus on these points, the drafters finally decided to show their intent to include aggression as part of the ICC's jurisdiction, by listing this crime in Article 5. But this crime will be of the competence of the Court only once the States Parties adopt a definition of aggression, and the conditions under which the Court could exercise its jurisdiction.

It is interesting to note that, as any crime can be added to the Statute by such amendment, this provision has little affect. Indeed, according to Article 123, seven years after the entry into force of the Statute, the "*Secretary General of the UN shall convene a Review conference to consider any amendments to this Statute. Such Conference may include, but is not limited to, the list of crimes contained in Article 5*".

Nevertheless, in September 2002, the Assembly of States Parties to the Court established a special working group, open to all States, to elaborate proposals for a provision on aggression.

- The crime of genocide (article 6 of the ICC Statute)

Although Nazis were indicted for having committed a genocide, the Judges of the International Military Tribunal (IMT) at Nuremberg considered this crime as being part of the crime against humanity, in compliance with Article 6(3) of the IMT Charter. The term genocide first appeared per se in a UN General Assembly resolution adopted in 1946, which listed "international crimes".

The 1948 Convention on the prevention and the punishment of the crime of genocide was the first international instrument to give a definition of this crime. The same definition could then be found in both Statute of the International Criminal Tribunals on Rwanda (ICTR) and Ex-Yugoslavia (ICTY) and in Article 6 of the ICC Statute.

What acts of genocide will the ICC prosecute?

The following five prohibited acts - if committed with the intention to destroy all or part of a national, ethnical, racial or religious group, as such - may constitute genocide:

- Killing members of the group;
- Causing serious bodily or mental harm to the members of a group;
- Deliberately inflicting on a group, conditions of life calculated to bring about its physical destruction;
- Imposing measures intended to prevent births within a group;
- Forcibly transferring children of a group to another group.

First, the definition of genocide was not the subject of any debate in Rome. No consideration was given to the possibility of extending the definition to cover social and political groups. But similarly, earlier attempts to restrict the definition further than the conventional definition were discarded.

Second, under Article 25 (3) (b) of the Statute, anyone who orders, solicits or induces someone to commit genocide (who carries it out or attempts to do so) is guilty of genocide. It is also a crime under the Article 25 (3) (e) if a person "*directly and publicly incites others to commit genocide*".

Article 25 (3) (c) states that anyone who aids, abets or otherwise assists someone to commit genocide or attempt to commit it is guilty of genocide. Article 25 (3) (f) provides that a person who attempts to commit genocide is guilty of the crime. In contrast to Article III of the Genocide Convention, conspiracy to commit genocide is not expressly defined as a crime under the Statute, Article 25 (3) (d) provides that much the same conduct is a crime.

Third, the intention to destroy all or part of a group, as such, is an essential element of the crime, it is crucial, and at the same time often very difficult, to find clear evidence of the motives and intentions that lie behind acts.

- Crimes against humanity (article 7 of the ICC statute)

Such crimes were not codified in an international instrument until the Charter of the Nuremberg Tribunal in 1945. Crimes against humanity as identified in the Nuremberg Charter were recognized as part of international law by the United Nations General Assembly the following year and were included in subsequent international criminal instruments, including the Statutes of the ICTY and ICTR. They have now been defined for the first time in an international treaty when the Rome Statute of the ICC was adopted on 17 July 1998.

What acts constitute crimes against humanity?

The list of acts that constitute crimes against humanity for these purposes includes murder, extermination, enslavement,

deportation or forcible transfer, severe arbitrary deprivation of liberty, and torture.

It also includes the following:

- "*Rape, sexual slavery, enforced prostitution, forced pregnancy and enforced sterilization or any other form of sexual violence of comparable gravity*"

The Holy See, backed by the Arab League nations, mounted a concerted attack against the inclusion of this crime, as well as on persecution based on gender (below). In the end, they were unsuccessful in that both forced pregnancy and the term "gender" were included in the treaty.

- "*Persecution...on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under international law*"

The inclusion of gender persecution in the treaty was achieved in the face of strident opposition. Another controversial inclusion is persecution on "other grounds" beyond those specified in the statute, but the confusing limitation to those "universally recognized" grounds is regrettable. Of real concern is the requirement that persecution must be committed in conjunction with another crime under the statute. This removes the prosecution of persecution per se from the Court's jurisdiction, which is inconsistent with the clearly stated position of the International Criminal Tribunal for the Former Yugoslavia that persecution is in itself a crime against humanity.

- "*Enforced disappearance of persons*"

Enforced disappearance as such is only covered by Article 7 of the Rome Statute, not in the war crimes section in Article 8. It does not appear in the IMT Charter and the Statutes of the ICTR and ICTY. Accordingly, there was some reluctance to include the crime into the Rome Statute. But definition of enforced disappearance builds to some extent on the definition in the 1922 UN Declaration on the Protection, however slightly more restrictive.

- "*other inhumane acts of a similar character intentionally causing great suffering, or serious injury to... body or health.*"

Finally, this important and controversial generic category was included. This gives the Court the flexibility to cover other crimes against humanity that may emerge over time, not contemplated in the statute, which is very positive.

- "*Apartheid*"

The crime of apartheid does not appear in the Nuremberg Charter nor does it appear in the ICTY and ICTR Statutes. However apartheid has been repeatedly condemned by the UN General Assembly and characterized since 1965 as a crime against humanity

What distinguishes ordinary crimes from crimes against humanity?

The Statute distinguishes ordinary crimes from crimes against humanity over which the International Criminal Court has jurisdiction in three ways:

First, the acts which constitute crimes, such as murder, must have been "committed as part of a widespread or systematic attack". And, the perpetrator must have known that the conduct was part part of or intended the conduct to be part of a widespread or systematic attack. However, the word "attack" here does not mean a military attack and can include laws and administrative measures such as deportation and forced displacement. Moreover, this term seems to exclude isolated and unconnected crimes of individuals.

Second, they must be "directed against a civilian population."

Third, they must have been committed pursuant to "a State or organizational policy". Thus, they can be committed by state agents or by persons acting at their instigation or with their consent or acquiescence, such as death squads. Crimes against humanity can also be committed pursuant to policies of organizations, such as rebel groups, which have no connection with the government.

Can a crime against humanity be committed in war or in peacetime?

Many States at the Rome conference considered that acts may amount to crimes against humanity only if committed during an armed conflict, as stated in the IMT Charter. Finally, States reaffirmed that crimes against humanity can be committed in either times of peace or armed conflict by omitting any link to armed conflict, as in the ICTR Statute.

Is there any requirement that the acts be committed with a discriminatory intent?

In contrast to the unique jurisdictional requirement in the Statute of the International Criminal Tribunal for Rwanda,

there is no such requirement in international law or the Statute, except with the crime against humanity of persecution.

- War crimes (article 8 of the ICC statute)

During the Rome negotiations, it was agreed that the term "war crimes" was general enough to cover the whole field of norms applicable to armed conflict, principally *1907 Hague law or the 1949 Geneva Conventions and 1977 protocols*. Given this large body of law, it became necessary to make a selection of norms that merited inclusion in Article 8 of the Statute, by considering whether the proposed crimes were serious and egregious enough, and whether the norms proposed for inclusion were established as part of customary international law entailing individual criminal responsibility. Thus, in several places the ICC formulations are different from and more restrictive than the established definitions on which they are based. The statute is far from comprehensive, having omitted various provisions of Hague and Geneva law, thus excluding them from the Court's jurisdiction.

Can the Court have jurisdiction over isolated war crimes?

A chapeau to the war crimes section provides that the Court will prosecute war crimes "*in particular when committed pursuant to a plan or policy or as part of the large scale commission of such crimes.*" This does not impose another jurisdictional limitation on the Court, but makes clear the objective is to prioritize the most serious crimes that demand international prosecution.

War crimes in international conflict (Article 8.2(a))

The drafters of the Rome Statute recognized the traditional distinction between norms applicable to international armed conflict and those applicable to non-international armed conflicts. Article 8 (2) covers war crimes that are grave breaches of the Geneva Convention and apply to international armed conflict. The international list contains 34 crimes. One of the most significant departures from existing language can be seen in the crime of launching an attack that causes incidental civilian losses, included for international conflicts, entirely omitted for internal. At the initiative of the U.S., the principle of proportionality inherent in this crime is reformulated so that the ICC *only has jurisdiction over attacks with a civilian impact that is "clearly excessive*" in relation to the "overall" military advantage. While "clearly" seeks to exclude borderline cases, overall military advantage seeks to ensure that such military advantage would not be measured by the consequences of the single attack, but in the context of the broader military operation.

One of the most difficult provisions to resolve was that on prohibited weapons. In the course of the conference, when certain states in favor of the inclusion of nuclear weapons realized that there was no prospect of success on this, they unfortunately insisted that chemical and bacteriological weapons also be removed. The resulting list of prohibited weapons is very short - poison or poisoned weapons, asphyxiating or poison gases or liquids, and dum-dum bullets - with no effective catch-all clause for other weapons causing unnecessary suffering. Although there is a provision that specifically contemplates the possibility additions to the list of weapons in the future, the only prospect for expansion of the list is by the difficult amendment process.

At least as controversial was the *inclusion of crimes of sexual and gender violence*. Focused on the historical failure to address these crimes, the women's caucus successfully campaigned to have "rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization and any other form of sexual violence of comparable gravity" explicitly included as a separate category of war crimes, notwithstanding ferocious lobbying by those opposed to its inclusion. As a result, no longer will these crimes have to be defined only as crimes against honor or as part of some other category.

Another crime included for both types of conflict, which the HRW Children's Rights Division strongly pursued, is *conscripting or enlisting children under 15* or using them to participate actively in hostilities. In another example of reformulating Geneva language, "recruiting" was replaced with "conscripting or enlisting", principally at U.S. insistence. In the international conflict context the crime is unfortunately limited to conscription or enlistment into "national" armed forces. Human Rights Watch had pressed for alternative language, using 18 as the relevant age for ICC purposes. On this point many key states expressed unwillingness to move beyond the framework of the Additional Protocols to the Geneva Conventions which establishes 15 as the relevant age, although they were willing to depart from the wording of the Protocol on the formulation of this and other crimes. In the end there was broad support for these provisions as reformulated.

War crimes in non-international conflict (Article 8.2(b))

The Court's ability to prosecute crimes committed in the context of internal armed conflict was as contentious as it promised to be. The list of crimes committed in internal conflict over which the Court has jurisdiction is unsurprisingly more restrictive than those committed in international section. As such, the Court will be able to prosecute crimes such as attacks

causing incidental civilians losses, the starvation of civilians, or the use of prohibited weapons, for example, only when committed in international but not in non-international armed conflict. However unacceptable this differential is, the final resolution is better than it threatened to be even in the final days of the conference, and allows for the prosecution of very serious war crimes, whatever the context on which they are committed. The statute list covers all of Article 3 to the Geneva Conventions and aspects of Protocol II. The list does not, however, include all prohibitions contained in Protocol II, omitting collective punishments, terrorism, slavery; attacks against installations containing dangerous forces.

Non-international conflicts do not apply to "situation of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of similar nature". In fact it applies "to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups".

A provision was introduced that provides that nothing in the statute shall affect the responsibility of a government to maintain or reestablish law and order in the state or to defend the unity and territorial integrity of the state by all legitimate means. While this provision gave considerable comfort to states otherwise opposed to the inclusion of internal conflicts, its impact is as yet unclear.

Article 124

A State, on becoming a party to the Rome Statute, may declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to war crimes when a crime is alleged to have been committed by its nationals or on its territory. A declaration under this article may be withdrawn at any time. The provisions of this article shall be reviewed at the Review Conference convened in accordance with article 123, paragraph 1.

It is noteworthy that only France and Colombia did make such declaration out of the 99 State Parties.

General principles of criminal law

- Individual criminal responsibility (Article 25)

The Court shall have jurisdiction over natural persons pursuant to the Rome Statute.

- Non retroactivity rationae tempore (Article 24)

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

- Minimum Age for ICC Jurisdiction (Article 26)

In a major breakthrough, early agreement was achieved that the Court would only have jurisdiction over persons of 18 years of age or older (Article 26). Many states had previously supported setting an age of criminal responsibility below eighteen, or allowing the court discretion to try minors based on subjective criteria such as the defendant's maturity. Presenting this issue not as one of the age of criminal responsibility but as a jurisdictional limitation made it possible to cut through the earlier stalemate, with the statute finally providing that "[t]he court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime."

- Command Responsibility (Article 28)

The provisions on the responsibility of commanders, along with superior orders, created the most controversy in this part of the statute. On command responsibility, the statute distinguishes between military and other commanders. For the former, it sets out the Nuremberg test: he or she must have known, or owing to the circumstances should have known and failed to take reasonable measures to prevent the crimes or to submit them for investigation afterwards. For civilian superiors however, the standard is higher and the approach apparently unprecedented. The superior has to have effective authority and control over the persons and activities constituting the crimes, and must have known or consciously disregarded information that clearly indicated that subordinates were committing or were about to commit crimes, and failed in the manner referred to above.

- Superior Orders (Article 33)

Regarding superior orders as a defense, the ICC treaty takes a step back from the Nuremberg Charter and the statutes of the ad hoc Tribunals, which contained an absolute prohibition on superior orders as a defense. While the statute is controversial in not ruling out the application of the defense, it does greatly restrict its scope. It only applies where the following criteria are met: there was a legal obligation to obey the orders; the person did not know the order was unlawful and the order was not manifestly unlawful. It expressly cannot apply in cases of genocide and crimes against humanity, which the statute deems inherently manifestly unlawfully.

- Non Bis In Idem

The important protection against double jeopardy is contained in the statute. "No person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court. No person shall be tried by another court for a crime referred to in article 5 for which that person has already been convicted or acquitted by the Court."

- Irrelevance of official capacity (Article 27)

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

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

Questions and comments:

- Political bias by international powers undermines transparency and impartiality of the Court, what are the available guarantees?

- Concurring jurisdiction between the African Court and the ICC and the qualification of the crimes of genocide and rape in the Darfur conflict.

- What is meant by 'systematic attack'?

- Does not the exclusion of individuals less than 18 years of age from jurisdiction of the ICC allow serious perpetrators to escape legal responsibility?

- How is it that the ICC fails to address the Arab-Israeli conflict or the crimes committed in the war against Iraq?

Responses:

Mr. Hafez Abu Seada

Mr. Amir Mohamed Suliman, KCHRED,
Mr. Hafez Abu Seada, FIDH, and Mr. Marceau Sivieude, FIDH

Referral to the ICC via the Security Council allows the Prosecutor to start investigations immediately without the State in question being party to the Rome Statute. One can object with the argument of political bias, however what makes us trust this referral is not biased is that the US has not ratified the Rome Statute, furthermore the US is leading an international campaign against the ICC through bilateral agreements with different States.

In addition there are several procedural guarantees in the preliminary investigations, in the following procedures, and in the trial. The Assembly of States Parties, not the Security Council, has important tasks. It elects the judges, who came from all region of the world, the Prosecutor and the Registrar and votes the budget. It should be recalled that the majority of State parties to the Rome Statute are from the South.

The Statute sets out a system for an independent and international criminal court; in fact this constituted a bitter battle, because the United States insisted all along on the restriction of the right of referral by the Security Council, which would have meant the establishment of a 'special' international criminal court similar to the Rwanda Tribunal. Nevertheless, we know that the Security Council has the mandate of preserving international peace and justice.

The issue of ability and willingness remains disputable; it is a substantive and not only a formal question. The United Nations Human Rights Commission has outlined standards pertaining to the independence of the judiciary, and it also

releases reports on the status of the legal system in each country i.e. whether there is intervention from executive powers into proceedings of the judiciary or not, and whether judges are nominated without bias to religion, race, color or political orientation.

A State Party can forward arguments concerning the ability of its judicial system, as can groups who present complaints to the Court, thus enabling an objective assessment of the matter, although there is no specific body that can decide conclusively in that regard.

The Security Council's relationship with the ICC is based on the Council's responsibility in preserving international peace and security and not as a party to the Rome Statute. The Security Council can decide that the situation in a certain country constitutes a threat to international peace and security and on this ground refer the situation to the ICC. Political factors can evidently not be ignored, however the fact that the Court is independent is an objective guarantee against political bias. The Court carries out its own investigations, listens to witnesses and collects information. The Prosecutor, on this basis, is entitled to decide whether to complete an investigation or not, and whether the crimes committed fall under the jurisdiction of the Court. Only the Prosecutor can decide on the admissibility of a certain situation.

The ICC is not a court of appeal, it is a parallel legal system, and if the national judiciary fulfills its functions there is no jurisdiction for the ICC.

Mr. Marceau Sivieude

There is no concurring jurisdiction between the African Court and the ICC, since the first is not yet functional and it deals with violations committed by States not individuals. The question of genocide in Darfur is the prime issue of the ICC, i.e. the ability to qualify such a crime without political interference. The UN has published a report recently on the situation in Darfur in which it is stated that crimes against humanity and war crimes have been committed in the region and that it is the duty of the ICC to qualify the case of genocide.

One of the crimes listed within the definition of the elements of war crimes is the crime of rape mentioned in the Statute as a violation of law. For the first time the Statute specified rape as a war crime.

Systematic attack is related to the third condition, i.e. a State or an organizational plan, one isolated act cannot be qualified as a crime against humanity; it has to take place within the scope of a widespread and systematic attack against civilian population.

Most of the children converted into combatants were forced to be part of the conflict, that is why the draft has excluded the age group under 18, this however does not exclude the role of national jurisdiction in addressing these crimes; international and national jurisdiction should complement each other.

The crime of aggression is not yet part of the jurisdiction of the Court. There are only 3 crimes: genocide, crimes against humanity and war crimes, however there is political intent that this crime be included into the competence of the Court. Because there is yet no consensus on the definition of the act of aggression it is not in the Statute.

In article 123 it is stated that the Secretary General of the United Nations shall convene a Review Conference to consider any amendments to the Statute seven years after its entry into force, opening the door for inclusion of other crimes such as aggression. A working group has already been formed in 2002 to address the inclusion of the crime of aggression and therefore it is an ongoing process.

Under the Statute of the ICC no immunity can block an investigation or prosecution by the ICC. The ICC puts aside all immunities and the Court can prosecute any individual without limitations and in disregard of all immunities on national level.

3. The organization of the ICC and current challenges

Ms. Jeanne Sulzer, FIDH International Justice Director

Structure of the ICC

The structure of the Court is divided into 4 different divisions:
1. Chambers
2. Office of the Prosecutor (OTP)
3. Registry
4. The Presidency[16]

16. Article 34 of the Statute provides for the Presidency to be constituted within the Court.

There are three types of Chambers: pre-trial chambers, trial chambers and the appeals chamber.[17] The pre-trial chamber is concerned with checks and balances over the acts of the Prosecutor. It has a central role in challenging the admissibility of a case and is a forum for victims' and their representatives; it acts as a counter-balance to the Prosecutor. According to the Rules of the Court adopted by the judges, a pre-trial chamber is designated by the President, for every situation before the Court; hence it is a control organ where the decisions of the Prosecutor can be challenged.

The Court is composed of 18 *judges* elected by the Assembly of States Parties (ASP).[18] Every State Party can nominate a candidate for judge.[19] Election of judges is based on geographic distribution and gender criteria.[20] Today there are no judges from the Arab world, since only Jordan has ratified the Rome Statute at the time of elections but has not nominated a judge but there are judges from Africa (Ghana, South Africa, Mali). A President of the court has been elected namely the Canadian national Philippe Kirsch.

The *Office of the Prosecutor is basically* divided into four main organs:

- The immediate Office of the Prosecutor: elected unanimously by the Assembly of States Parties, occupied by the Argentinean Luis Moreno Ocampo.

- The Division of Investigation headed by the Deputy Prosecutor elected by the ASP

- The Division for Prosecution headed by the Deputy Prosecutor elected by the ASP.

- The Jurisdiction, Complementarity and Cooperation Division.

The fourth division - the Jurisdiction, Complementarity and Cooperation Division (JCCD) - is an invention of the Prosecutor himself. It is more or less of legal and political nature and is concerned with analyzing applicability of the complementarity principle i.e. whether there are mechanism for implementation of ICC jurisdiction on the national level, it undertakes primary analysis of cases coming to the Court.

The *Registry* has non-judicial functions; it has a division for victims and witnesses primarily concerned with their protection, a division for victims' participation and a defense section, as well as a public council for defense and a public council for victims, in addition to a Registrar and a secretariat.[21]

The budget of the ICC in 2005 was ☐ 68 million; the budget requested for 2006 is 22% higher due to the three investigations in Uganda, the Democratic Republic of Congo (DRC) and Darfur. In comparison, the budget granted to the International Tribunal for the former Yugoslavia was in the recent years around ☐ 120 million.

Staff of the ICC is composed of 661 persons, and until now the Court has had only four field offices. Funding comes from States Parties according to the same macro-criteria used in the United Nations.

Policy of the Prosecutor

The Prosecutor has decided to establish 6 phases in analysis of any given case:

- Phase 1: starts right after reception of a communication. A priori there is jurisdiction of the Court, at least 7 situations are being currently analyzed.

- Phase 2: decision to open an investigation, as is the case in the DRC, in Uganda regarding the Lord's Resistance Army since July 2002, and in Darfur.

- Phase 3: pre-trial phase before delivery of arrest warrants, this is the situation now for the DRC.

- Phase 4: trial phase, no hearings are to take place before 2006.

- Phase 5: appeal.

- Phase 6: implementation of Court rulings.

17. Article 39(2)(b) of the Statute.
18. Article 36(1) of the Statute. The number of judges may be increased by the two-thirds majority of the ASP on the Presidency's request (Article 36(2) of the Statute).
19. Article 36(4) of the Statute.
20. Article 36(8)(a)(ii)-(iii) of the Statute, Article 36(8)(a)(i) also provides for the representation of principle legal systems of the world.
21. Article 43 of the Statute.

There are 3 ways to trigger the Court:

1- Referral from a State Party to the ICC; there are 99 States. Any State Party can refer a situation to the Prosecutor, not only on its own territory but also on the territory of any other State Party.

2- Referral from the Security Council, acting under Chapter VII of the UN Charter.

3- Simply sending information to the Prosecutor; lawyers, individuals and NGOs can send information to the Prosecutor asking to open an investigation into a particular situation. Actually, the Prosecutor can open an investigation on his own behalf.

For a crime to fall under jurisdiction of the ICC it must be committed on the territory of a State Party or by a national of a State Party.[22] Only in the case of a Security Council referral can this condition of nationality and territoriality be overrun.[23] In all cases, the Prosecutor can just decide on his own behalf if there is reasonable basis to proceed with an investigation. He has to notify the decision to open an investigation to all States Parties and all States having jurisdiction traditionally over the alleged crimes as stated in article 18(1): "*When a situation has been referred to the Court pursuant to article 13(a) and the Prosecutor has determined that there would be a reasonable basis to commence an investigation pursuant to articles 13(c) and 15, the Prosecutor shall notify all States Parties and those States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned. The Prosecutor may notify such States on a confidential basis and, where the Prosecutor believes it necessary to protect persons, may limit the scope of the information provided to States.*"

Therefore, when the Prosecutor decided to open an investigation into the situation in Darfur, he must have notified the Sudanese Government. Notification is actually the first 'complementarity test', since the State can ask for a halt of the investigation and initiate its own prosecution procedure thus exercising complementarity.[24] As such and according to the Statute, only in the case of unwillingness from the side of the State concerned does the case go back to the Court.[25]

The Prosecutor may start an investigation upon referral of situations of crimes by a State Party, the Security Council or on his own initiative. In all cases, the Prosecutor must evaluate material submitted to him and decide whether to proceed with the prosecution. Around 1100 communications have been sent to the Office of the Prosecutor:

- Three State Parties so far have made referrals for crimes committed on their territories since 1 July 2002, date of the entry into force of the Rome Statute. These are: Uganda in December 2003 for crimes committed in Northern Uganda; the Democratic Republic of Congo (DRC) in April 2004, and the Central African Republic in December 2004.

- On the 31 March 2005 the Security Council referred the situation in Darfur - Sudan to the ICC with abstention of the US.

- The rest of the information he received came from other sources, including NGOs or victims.

Based on information collected, the Prosecutor opened three investigations: the first in DRC on 23 June 2004 (which focuses on Ituri, Eastern Congo), the second in Northern Uganda, opened on 29 July 2004, and the third on 6 June 2005 in the situation in Darfur, Sudan.

Mr. Ocampo has, as of today; privileged situations referred to him by States Parties rather than used his *proprio motu* power to act on his own initiative.

On one hand, a State Party referral might guarantee better cooperation from the State as the ICC largely relies on States' cooperation to fulfill its mandate. On the other hand this approach could hold the risk of political instrumentalities of the ICC.

The FIDH has used the mechanism of article 15 to send communications to the Court on the alleged commission of crimes falling within the jurisdiction of the ICC in the following situations:

- Democratic Republic of Congo

- Central African Republic

22. Article 12(2) of the Statute.
23. Ibidem.
24. Article 18(2) of the Statute.
25. Article 18(3) of the Statute.

- Ivory Coast

- Colombia

The Prosecutor has indicated that he has received more than 1000 communications till today, 3 from States Parties, 1 from the Security Council and one accepting jurisdiction of the Court on an ad hoc basis. The Prosecutor does not have to investigate them all but he has to consider the cases. 99% of referrals came from civil society organizations and individuals. When the different delegations met in Rome they were thinking that one State would refer the situation of another State and not the case of crimes committed on its own territory. In contradiction by contrast with the Nuremberg Tribunals the ICC is a court that investigates at the same time that crimes are being committed, therefore issues of protection of victims and witnesses have great significance and have been addressed by the Statute.

Challenges facing the Court

Article 53 describes three criteria for the decision to open an investigation:

- The information available provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;

- The case is or would be admissible under article 17;

- Taking into account the gravity of the crime and interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.[26]

The first and the third criteria are evidently very subjective since the Prosecutor can decide not to open an investigation if there is no 'reasonable basis' or if an investigation does not serve the interest of 'justice'.

Another difficulty *is the limited jurisdiction of the Court;* since the Court's budget is quite small it cannot deal with all alleged perpetrators in any given situation. The Prosecutor stated clearly that only those who bear the highest responsibility are to stand before the Court. This creates an 'impunity gap' since all individuals who fall below the uppermost level of responsibility are thus to be left for national jurisdiction. This criminal policy decision has direct consequences on the implementation of the complementarity principle with national courts; recall that the ICC is complementary to national courts contrary to the former ad hoc tribunals established by UN Security Council Resolutions.

A number of factors actually contribute to the ICC *impunity gap:*

1. If crimes within the jurisdiction of the ICC are committed in a country, the ICC pursuant to the Rome Statute will only look at the "most serious crimes".

2. Within those "most serious crimes", the ICC will only target the leaders that have the highest responsibility in the commission of the said crimes.

3. Therefore, whether or not the State concerned will decide to exercise its complementarity with the ICC, there will still be, in any case, a large responsibility in the fight against impunity which will rest on the State's national tribunals' capacity and on the State's willingness policy to open investigations.

For the FIDH, it is absolutely essential that the Prosecutor makes clear policy statements when deciding to take a case. In the interest of victims, the ICC should be clear from the beginning that it has limited resources and therefore a limited reach of whom it can indict.

Knowing that, one even more challenging issue is how the ICC will interpret the complementarity principle. One should remember that according to article 17 of the Rome Statute, the ICC has jurisdiction only if the State is unwilling or unable to prosecute.

26. See FIDH position paper on the issue of "interest of justice" on the FIDH website www.fidh.org

Article 17 of the Rome Statute

1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:
(a) The case is being investigated or prosecuted by a State, which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
(b) The case has been investigated by a State, which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
(c) The person concerned has already been tried for conduct, which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;
(d) The case is not of sufficient gravity to justify further action by the Court.

2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:
(a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;
(b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
(c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner, which, in the circumstances, is inconsistent with intent to bring the person concerned to justice.

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

In the draft policy paper the inability criterion is considered as an objective criterion and on the contrary the unwillingness criteria is said to be subjective.

The main issue is how will the Court- the judges, be able to independently assess and analyze the notion of interest of justice and the national judicial system of a State. Clearly, the principle of complementarity has not been created to protect national sovereignty. Therefore, there should be a set of clear guidelines and a checklist to provide an objective determination on how the State is conducting investigation and prosecution at the national level.

Here national civil society, human rights NGOs in particular have an important role to play. Building upon their experiences in drafting shadow reports national NGOs are often in a better place to monitor the judicial system of their country.

Furthermore, the ICC should acknowledge its role as a deterrent mechanism to avoid the commission of future crimes. Prevention cannot and should not be opposed to the fight against impunity. The Office of the Prosecutor necessarily needs to implement its own set of preventive policy guidelines. Prevention and Justice are two landmark pillars that need to be addressed in the interest of victims and peace.

While the ICC is in a position to act in response to State's failure to fight against impunity, its deterrent and preventive powers should not be underestimated. In that regard also, the FIDH believes that the ICC can be complementary to States. The complementarity principle should be understood to encompass the exercise by the ICC of any action that would aim at preventing future violations, in particular when States are incapable or unwilling to do so.

One example: in October 2002, with the ICC already an existing entity having jurisdiction over nationals of States Parties or crimes committed on the territory of States parties since 1 July 2002, the Central African Republic faced a violent "coup d'Etat" which resulted in the alleged commission of war crimes. The FIDH urgently decided to send an international fact finding mission, which concluded that there was sufficient evidence of summary executions and rapes on minor girls. With its affiliated organization in the Central

African Republic, the FIDH decided to use the newly created ICC as a mean to deter the commission of future crimes.

The impact of the FIDH public notice that information was sent to the relevant instances of the ICC has been, from our view, important. Today, it is impossible to assess the real contribution of the ICC, as a sword of Damocles, in the then on-going conflict in the Central African Republic. However, it is, in the same manner impossible to imagine what would have the status of the conflict today should no emergency button had been used.

The simple message I am trying to convey is that the ICC should be able to reach out and voice concerns at a much larger scale and thus maybe prevent future grave human rights violations.

Measuring the preventive impact of the Office of the Prosecutor can only be a post facto assessment, yet it is in the vital interest of the ICC to try, whenever possible, to use this tool and hopefully prevent other crimes against humanity and genocide from happening.

The independent status of the Prosecutor enables him to be above realpolitik considerations that govern the Community of States. It is absolutely crucial that his voice be heard without consideration of color, nationality, religion or state's interests. If this is true for an effective ICC prosecution strategy, it is equally true for an effective ICC preventive strategy.

V - SESSION 2 - THE ICC TODAY

1. Status of ratifications and implementation of the ICC Statute

Ms. Stéphanie David, on behalf of Ms. Anjali Kamat, Outreach Liaison Officer for North Africa and the Middle East within the Coalition for the ICC (CICC).

The Coalition for the International Criminal Court is a dynamic and diverse network of over 2000 NGOs in 150 countries around the world working together to ensure a fair, effective and independent ICC .

The last 10 years saw the realization of the most ambitious and revolutionary project to codify international criminal law - the establishment of the International Criminal Court, which represents humanity's best hope for ending impunity for those who commit the gravest human rights violations: war crimes, genocide and crimes against humanity. A progressive strengthening of international justice mechanisms has occurred beginning in the 90s through to the present, by the creation of *ad hoc* UN tribunals for the former Yugoslavia and Rwanda, as well as alternative mechanisms for social reconciliation, such as national truth and reconciliation commissions and "hybrid" domestic-international tribunals. The establishment of the world's first independent and permanent ICC in July 2002 was a momentous step in the struggle to ensure the protection and promotion of fundamental human rights.

As it is often mentioned, the 20th century has been the bloodiest and most war-torn in all of recorded history. Yet, today, 5 years into the 21st century, in direct contradiction with the principles of international law and respect for human rights, the bloody wars and violent conflicts persist, and the perpetrators of these most heinous crimes against humanity continue to enjoy full impunity.

The persistence of bloody wars underlines the urgent need to fundamentally strengthen both national and international justice systems to prevent such atrocities in the future. With individual criminal jurisdiction over war crimes, crimes against humanity, and genocide, the innovative and victim-centered ICC has the potential for ending a culture of impunity, which has allowed flagrant violators of international human rights and humanitarian law to routinely escape justice.

The ICC is investigating in your country on the basis of an international treaty establishing the International Criminal Court. This treaty was established to hold accountable those most responsible for committing crimes against humanity, war crimes or genocide, which in reality will likely mean a handful of high level commanders responsible for setting up the policies and structures that resulted in these crimes. It is the Coalition's belief that the ICC is only one essential part of a broader vision of international justice, where national courts, truth and justice mechanisms, and international Courts complement each other to ensure that victims of the worst violations are never denied justice. National justice systems continue to have the primary duty to investigate and prosecute crimes committed under its laws. The ICC steps in only when the national system has failed to do so. For example, currently the United Kingdom is domestically prosecuting soldiers accused of committing war crimes in Iraq under its domestic law called the "International Criminal Court Act of 2001." If these investigations and prosecutions go forward, the ICC will not be able to act.

The ICC is not a UN body; it is independent. However, the UN Security Council can request that the ICC take up an investigation, as it did for the situation in Sudan. The Rome Statute, which was agreed to by the whole world - 180 countries, with very different legal systems, all came together and agreed to give the SC the power to refer a case to the ICC for investigation.

The CICC, whom I represent, is independent from the ICC. We are a global network of more than 2000 civil society organizations from around the world that support the concept of accountability for those responsible for grave crimes and that are committed to fulfilling the promise of the Rome Statute. We support public awareness of the work of the ICC. However, we do and will criticize the Court for what we see as deficiencies in its policies.

As the ICC begins investigating its first four cases, the Coalition will remain vigilant in ensuring the ICC lives up to the high expectations placed on it, and is provided the resources to effectively perform its duties.

The history of the Coalition's experiences, since it was founded in 1995 as an informal network of mostly human rights organizations supporting the idea of a permanent ICC, offers important lessons on collaboration and strategic

partnership, in advocating for the universal rule of law and ending impunity. It also highlights the necessity of both local grassroots and international engagement, and close partnerships between governments, academics and non-governmental organizations. Even after the historic adoption of the Rome Statute in 1998 by an overwhelming majority of countries, few expected an early establishment of the ICC.

The treaty effectively challenged earlier concepts of sovereign immunity, which had shielded the powerful from ever facing justice, even when accused of massacring millions of their own citizens. The core crimes in the Statute: war crimes, crimes against humanity, genocide, and especially, the yet undefined crime of aggression, required intense negotiations and made many governments cautious. The treaty faced, and continues to face, vigorous opposition from the world's only superpower, which demanded immunity for American citizens. Yet despite these challenges, and while treaty after treaty was stalled in the UN, from small arms, to the Kyoto Protocol, to the nuclear test ban treaty, the 60 ratifications necessary for the entry into force of the Rome Statute were achieved, and the Statute entered into force in July 2002. The movement's success resulted from a constructive partnership between like-minded governments, NGOs and intergovernmental organizations. Observers have repeatedly said that without the historic leadership of hundreds of non-governmental organizations, which offered critical technical expertise, trained each other, shared resources, raised public awareness and created political will in country after country, the ICC may have remained a distant dream.

With more than 2,000 members around the world the Coalition today is a dynamic force representing a broad cross section of global civil society. The Coalition is structured around a Secretariat in New York and The Hague and an international Steering Committee, which includes the FIDH. It has regional campaign coordination centers on five continents, thematic Caucuses (on issues such as faith, children, victims, and universal jurisdiction) as well as regional and national campaigns for ratification and implementation of the Rome Statute.

Since 1995, the Coalition has provided latest information about ICC developments, created advocacy tools and resources, facilitated the participation of thousands of NGO representatives to the Preparatory Commissions and Assemblies of States Parties and promoted worldwide efforts to establish the Court. The umbrella of the CICC allowed pooling of financial and technical resources, specialization of skills-based roles and avoided the duplication of efforts. Advocacy by Coalition NGOs during the Rome Conference ushered in advances in international law, especially in the areas of gender justice, children's rights and victims' rights. The Coalition worked with governments to insist upon and ensure a transparent process for the election of the Judges and Prosecutor of the ICC, a process traditionally governed by closed internal discussions and mutual agreements between governments, with little consultation with wider civil society. Since the Court's establishment, the CICC monitors its developments and seeks to ensure that the Office of the Prosecutor, the Registry and the Judges hears civil society concerns.

Today there are 99 States Parties to the Rome Statute,[27] ensuring that over half of the UN member States are now part of this strengthened international justice system. 40 countries, including Algeria, Bahrain, Egypt, Iran, Kuwait, Morocco, Oman, Sudan, Syria, the UAE, and Yemen have signed but have not yet ratified the treaty. Iraq, Lebanon, Libya, Qatar, Saudi Arabia, and Tunisia have not signed the Rome Statute. The Rome Statute has been a resounding success in Europe, Latin America and much of Africa, while the vast majority of countries in the Middle East, North Africa and Asia still remain outside of the Court's jurisdiction. Within the Arab League, only two countries, Jordan and Djibouti, have ratified the Statute.

The states of the Middle East and North Africa now face an exciting challenge, by choosing to be among the first 100 States Parties to the 21st century's newest international institution, which offers hope to the victims of the most egregious crimes. Adhering to the Rome Statute enables states to consolidate their commitment to justice and accountability in the future, and strengthen their place internationally as a country, which places high values on fundamental human rights. Without ratification, states will not have an opportunity to nominate future judges to the ICC, nor will it be able to vote on the election of future judges and other Court officials, or take part in the decision-making process shaping the Court. Without representation of countries among the States Parties, Arab and Middle Eastern civil society will lack the critical leveraging power to influence

27. On 28 October 2005 Mexico ratified the Statute with effect from 1 January 2006 and became the 100th State Party.

the process that is enjoyed by civil society from States Parties, who are often consulted by their national delegations. Many of the region's governments have expressed concern about the yet undefined crime of aggression in the Rome Statute, as well as a lack of an explicit definition of terrorism. These concerns make it all the more urgent for MENA countries to ratify the Rome Statute, as only state parties can vote on defining the crime of aggression and other treaty provisions at a Review Conference scheduled for 2009.

The Coalition urges Middle Eastern and North African states to accelerate their ratification processes in order to become of the first 100 States Parties to the Court.

As part of our ongoing global campaign, the CICC Secretariat will continue to support our members in the region by strengthening existing national coalitions for the ICC in Bahrain, Iraq, Jordan, Morocco, and Yemen, and by encouraging and assisting the formation of national coalitions in the rest of the region. We shall continue to provide updated information and resources for national and regional ICC-related campaigns to our members and national coalitions, as well as ensure regional representation at the Assembly of States Parties and other ICC related intergovernmental and NGO meetings.

We urge NGOs present at this meeting to become members of the CICC and create a new Sudanese Coalition for the ICC.

The creation of world's first permanent judicial mechanism with individual criminal responsibility over war crimes, crimes against humanity and genocide has been hailed as the most significant advance in international law since the creation of the UN. It is my utmost hope that we can continue to work collectively towards the universal ratification and implementation of the Rome Statute in the Middle East and North Africa.

2. The United States position and the ICC

Ms. Stephanie David, FIDH North Africa and Middle East Program Director

It is spectacular that the ICC came into force on 1 July 2002 while in parallel the United States developed a very imaginative and dangerous opposition to the first permanent International Criminal Court. The US campaign against the ICC has been growing in intensity throughout the years since 1998. Today, the US opposition to the ICC has reached such a level of hostility that one could say that the US is in war with the ICC.

What is at stake? The opposition of the US administration is based on their absolute refusal that a US citizen is one day investigated or prosecuted before an International Criminal Court. The US claim that politically motivated claims may put US citizens and in particular soldiers in a difficult position

The United States was one of the 7 States to vote against the Rome Statute establishing the International Criminal Court on 17 July 1998 in Rome.

The US during the negotiations was in favor of an ICC under the authority and the control of the UN Security Council so as to keep effective control over the possible reach of the ICC jurisdiction. What has been adopted is far from the US ideal as the ICC can be triggered - as we will see later today - by either a state party, the Security Council or by the prosecutor itself. The role of the Security Council, in theory had been kept aside from preventing to limit the ICC jurisdictional reach. However and pursuant to a US proposal in Rome the US got the adoption of article 16 that gives the Security Council the power to freeze an ICC investigation for one year. But for this to happen one would need to have a unanimity vote in favor of such a blockage in the ICC proceedings, which might be difficult to get with two permanent member of the Security Council being state parties that is France and the UK.

Since it's clear opposition on the day of adoption of the Rome Statute, the United States has been seeking the means of guaranteeing that their nationals would never been prosecuted by the ICC.

When on 31 December 2000, when Clinton asked his Ambassador for war crimes, David Scheffer, to affix the signature of the United States to the ICC Statute, a glimmer of hope appeared. Very soon however, rumors were circulated to the effect that the Bush government intended to "un-sign" the Statute. Since March 2001, the seats of the American delegation to the ICC negotiations have remained despairingly empty.

To do so they built complex legal machinery and started almost simultaneously to undertake actions at the domestic level, the international level and state bilateral level.

- Level 1: At the domestic level: "The Hague Invasion Act"

The first legislation adopted by the US Congress in August 2002, is known as the "American Service Members' Protection Act" (ASPA). The ASPA contains provisions restricting US cooperation with the ICC, making US support of

peacekeeping missions contingent on achieving impunity for all US personnel; it also aims, amongst other things, at prohibiting all military assistance to States having ratified the Rome Statute creating the future permanent Court.

This domestic legislation was quickly nicknamed "Hague Invasion Act" as it allows the use of force to free a US citizen that would be imprisoned in The Hague by the ICC and it represents the public doctrine of the US on the ICC. It recalls in its preamble that an international treaty cannot create obligations towards a non-State Party and that consequently the US refuses the jurisdiction of the Court over their nationals.

In December 2004, the Congress subsequently adopted the Nevercutt Amendment: this legislation is far more wide-reaching than ASPA and authorizes the loss of economic support funds to all countries, including many US allies, which have ratified the ICC treaty but have not signed a bilateral immunity agreement with the US; thus it poses the threat of broad cuts in foreign assistance, including funds for cooperation in international security and terrorism, economic and democratic development, human rights, and promoting peace processes.

- Level 2: At the State's bilateral level: the fallacious use of article 98 of the Rome Statute to enter into impunity non-surrender agreements

Since the end of 2002, the United States has approached nearly all the countries of the world in its effort to enter into Bilateral Immunity Agreements, purportedly based on article 98 of the Rome Statute,[28] excluding American citizens and military personnel from the jurisdiction of the ICC, in consideration of the possibility that they may be the target of politically motivated trials claimed by "hostile" countries. These agreements prohibit surrender to the ICC of a broad scope of persons including current or former government officials, military personnel and US employees and nationals. These agreements, which in some cases are reciprocal, do not include the obligation for the US to subject those persons to investigation and/or prosecution.

Where foreign forces are present with the consent of the receiving state, Status of Forces Agreements (SOFAs) usually regulate their status: these agreements give the sending or the receiving state a primary right to exercise its jurisdiction over certain crimes. In other words, when a State party could have the obligation to surrender an American national to the ICC, the latter would be transferred, according to these agreements, to American jurisdictions. And article 98 was designed to prevent legal conflicts, which might arise because of existing agreements or renewal of SOFAs. This article was not intended to allow agreements that would preclude the possibility of a trial by the ICC when the "sending state" did not exercise jurisdiction over its own nationals.

To date, several versions of these agreements have been proposed: those that are reciprocal, providing that neither of the two parties to the accord would surrender the other's persons without first gaining consent from the other; those that are non-reciprocal, providing only for the surrender to the ICC of US persons; and those that are intended for States that have neither signed nor ratified the Rome Statute, providing that those states not cooperate with efforts of third-party states to surrender US persons to the ICC.

8 countries from the North Africa and Middle East region would have entered into non-surrender impunity agreements: Bahrain, Israel, Tunisia, Egypt, Jordan, Morocco, Tunisia and United Arab Emirates. Most of the time, these agreements are signed in secret.

- Level 3: At the international level: using the Security Council to shield Americans from the jurisdiction of the ICC

The United States continued to undermine the jurisdiction of the Court and to violate the integrity of the Statute in the context of international diplomacy.

Having failed in its attempt to negotiate an "acceptable" ICC Statute in Rome and then during the following sessions of the Preparatory Commission for the ICC, the US decided to use the Security Council forum in order to ensure a political control over the jurisdiction of the Court. Despite the amazing mobilization of States, NGOs as well as the Secretary General

28. Article 98 of the Statute reads as follows:
"1.The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.
2. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain cooperation of the sending State for the giving of consent to surrender."

of the UN, Kofi Annan, Resolution 1422 was unanimously approved on 1 July 2002. That resolution grants immunity from the ICC to officials and personnel (current and former) of a contributing state not party to the Rome Statute over acts or omissions relating to a UN established or authorized operation. In other words, it was aiming at excluding from the jurisdiction of the ICC any national of a State non-party to the Rome Statute involved in UN peace-keeping operations and, foremost among them, American nationals. The resolution was then renewed as Resolution 1487 in June 2003 for one year.

In May 2004, after the alleged acts of torture perpetrated in Abu Ghraib, the US tried to pass in force the renewal of that resolution within 48 hours. But this attitude was deemed unacceptable by most of the Member-States of the Security Council; therefore the United-States withdrew the resolution once they could not secure enough votes in the Security Council.

The International Community has from now to make sure that any further resolution adopted by the SC will not contradict this positive evolution, as we can bet that the US will most of the time try to include a provision on immunity in resolutions creating or renewing peace-keeping operations.

In conclusion, the latest illustrative example of the American attitude towards the ICC is reflected by the case of Sudan, about the situation in Darfur: despite its opposition to the ICC, the US abstained rather than vetoed a UN Security Council resolution referring the case of Darfur to the Court, last March. Nevertheless, the US issued contradictory signals on whether it would support an ICC investigation: the acting US envoy to the UN said that US legislation prevented it from providing assistance and support to the ICC. Should the US follow this line there would be a possibility of the US becoming a haven for war crimes' suspects wanted by the Court.

Questions and comments

1. Most Arab countries are not ready to ratify the Rome Statute because the US refuses to do so, what is the ICC mechanism guaranteeing that the ICC will be guided legally and not politically?

2. What is the ICC mechanism of investigation; does it have power of obligation in reality if the affected country refuses investigation?

3. What are the sources of funding for the ICC and do not they affect the Court's neutrality?

4. Regarding conflict management, ICC is concerned with crimes committed in the setting of political strife, does this not affect attempts to resolve such conflicts and does this not somehow relate to the principle of the 'interest of justice' referred to?

5. A number of countries, particularly Arab States are not ready to ratify the Rome Statute with the argument that this affects sovereignty, why should not laws of these countries be amended to include ICC principles?

6. Since Sudan is one of 40 countries that have signed and not ratified the Rome Statute, on what basis does the ICC exercise jurisdiction in the Darfur case?

7. Concerning Darfur, should the Sudan Government refuse to comply, what are the measures that the ICC can undertake?

8. Since the Americans are trying to advocate for the International Criminal Tribunal in Arusha be competent in the case of Darfur, could you inform us about the difference between the two processes, ICC and Arusha?

9. Concerning the Darfur case, where have the proceedings stopped and what are the forthcoming steps?

10. What is the qualification of crimes committed in Darfur, are they individual crimes or state crimes?

11. It is known the Security Council can implement its decisions according to its power mechanisms, can we say that other than referral through the Security Council there will be great obstacles facing proceedings and decisions of the ICC?

12. The Prosecutor can be informed through individuals, if the case is so simple, where is the role of international organizations in the case of Abu Ghraib and Iraq in general as well as Guantanamo Bay, and on the other hand the Darfur case was simply referred to the ICC as such, there are evident double standards!

13. The JCCD is concerned with qualifying a State's judicial capacity, what was its role in the Darfur case?

Responses:

Ms. Jeanne Sulzer

Ms. Jeanne Sulzer, FIDH, Mrs.Hanim Adam, Journalist, Ms. Stéphanie David, FIDH

The mechanism the ICC can use to investigate if a country refuses to conduct an investigation is definitely a problematic matter; however, it is possible for the investigators to go on the ground on the territory where the ICC is investigating without cooperation of local authorities and national police, it is not an ideal solution but the Statute provides for that, in addition to the Agreement on Privileges and Immunities of the Court (APIC) that all States Parties and non States Parties have to sign; it permits all members of the ICC to travel to countries and investigate freely and it provides also for lawyers of defense and lawyers of the victims, functional immunity although it is not an ideal solution.

States Parties fund the ICC based on the same macro-criteria implemented in the UN assessment, today 80% is paid by Europe, mainly France and Germany, as soon as Japan or the US join in, they will surely become the main contributors.

In the case of a Security Council referral the UN was supposed to contribute to the funding of the investigation; due to the US lobbying the proposal of UN contribution was refused, there is a specific paragraph in the Security Council's resolution stating that there shall be no funding given to the ICC in order to contribute to investigations in case of referral from the Security Council, what has been denounced by many civil society organizations.

Concerning how the ICC can affect political processes on the national level, particularly peace talks, it is an important issue especially in the case of Rwanda. As a matter of principle there can be no peace without justice, however a discussion is feasible on the matter, at least to ensure that the ICC is not detrimental to peace and security.

According to article 16, the Security Council can suspend an investigation for one year if it decides that the investigation is a threat to peace and security, a clause that could thus be abused politically. It is an article that is strongly criticized.

On the issue of Sudan not being a State Party: Sudan is one of 40 countries that have signed but not ratified the Rome Statute. The legal basis for the Court exercising jurisdiction is first of all the Rome Statute adopted by 120 states on 17 July 1998, according to which the Security Council can refer a case to the ICC even though the crime has not been committed in a State Party to the ICC. Secondly, and this is a related point; one of the main reasons that the US is against the Court is precisely because it is possible that US citizens could be punished for crimes committed on the territory of a non-State Party. If the State where the crimes are committed is not a State Party and the individuals involved are citizens of a State Party the ICC has jurisdiction.

In the case of Iraq, communications have been sent about soldiers who have allegedly committed crimes and are nationals of States Parties to the ICC, in particular British soldiers, although Iraq is not a State Party. If Iraq had been a State Party the situation would have been much easier.

In case the Government of Sudan refuses to comply with the Court the Prosecutor can denounce the position of the Government to the Security Council. The Prosecutor presents his assessment before the Security Council every 6 months from the date of referral of the situation. He can then denounce non-compliance and non-cooperation but not much more, I believe. The use of force, I think, is very unlikely.

It is not clear whether the Prosecutor has notified States Parties in the Darfur case pursuant to article 18 of the Statute. In the case of the DRC notification has been made, almost no State however replied, only Belgium did, and they actually made efforts on national level to see if they had cases related to the DRC.

Regarding the status of proceedings on Darfur, we know that the case is in the hands of Pre-Trial Chamber I, headed by a judge from France who was former President of the International Criminal Tribunal for the former Yugoslavia. As far as I know, no officials from the ICC have yet visited Sudan.

On the question whether crimes committed in Darfur fall under the jurisdiction of the ICC, it is an accepted principle

since Nuremberg that behind States' actions there are individuals who are accountable, and the ICC is concerned exactly with individual criminal responsibility with material and mental elements.

On the issue of double standards related to Security Council referral, I understand this type of argument, and I can add: why did the Security Council not refer the cases of Chechnya and Palestine? We are all aware that the Security Council is an intergovernmental body that is basically political. The basis for referring the situation in Darfur was an official inquiry by the United Nations giving strong indications that crimes falling under the jurisdiction of the ICC have been committed in the region. I agree that there are many more situations that can be referred to the ICC.

The JCCD is not a tribunal; it is analysis body acting in the preliminary stage of investigations, taking contact with national governments and judiciaries. It analyzes complementarity issues, however its decisions have no legal force.

Why should States ratify the Rome Statute if the US does not? I think for good reasons, the US is not inside the Court, so it does not actually control the Court like it does the Security Council; you need to take side, either for or against impunity. When the US is left alone outside the Court, it will have no choice but to accept the ICC.

Ms. Stephanie David

Most Arab countries are reluctant to ratify the ICC Statute because many face difficult situations regarding human rights. Most are governed by emergency laws or went through civil wars or periods of grave human rights violations documented by independent investigations and reports of human rights organizations. This is one of the reasons for not going deeper into the process of signing and ratifying the Rome Statute. Some of them have strong relationships with the US and are under pressure, financial and political, not to sign or not to ratify. Many have entered into bilateral agreements with the US. We started our activities in the region in Yemen, then we went to Bahrain and we will continue to do so in six other countries in the region with the aim of raising awareness about the ICC and its jurisdiction among media, authorities and lawyers and the general public. We have achieved some national coalitions in the countries we went to. One of the reasons given by Arab countries for not ratifying the ICC Statute is the lack of definition of the crime of aggression, so of course, we will continue to work on this and this massive network will continue its campaign for denouncement and annulment of the bilateral immunity agreements signed with the US.

VI - SESSION 3 - ICC AND SUDAN

1. Legal and political obstacles for ratification of the ICC

Dr. Abdalla Ahmed Mahdi, General Lawyer

The ICC is built on the presumption that national courts are competent unless the conditions prove otherwise; the national judiciary can present arguments to strengthen this claim of competence. According to article 20 of the Rome Statute the national judiciary has priority over the ICC, i.e. the ICC cannot repeat a prosecution procedure concluded by national courts.

I have a number of remarks to make about the Statute of the Court:

1. Article 27[29] contradicts recognized constitutional rights of Heads of States and Members of Parliament, i.e. the article contradicts constitutional principles, however, the crimes mentioned in the Statute are already part of international law, the issue depends on whether Heads of State are apt to stand before Court or only under certain circumstances

2. Regarding surrender of citizens, the ICC is not a foreign country; it is an international body that complements national legal systems.

3. Powers of the Prosecutor are too wide and undermine sovereignty of States, however the prosecutor cannot just parachute into any country as he wishes.

4. Crimes under the jurisdiction of the ICC do not become non-punishable by lapse of time[30] due to the nature of these crimes, however this is not a novel feature of the ICC, but an acceptable principle of criminal law.

5. According to the Statute of the Court, repeated prosecution of the same individual for the same crime is not feasible. The exception is when the prosecution before the other court does not comply with international standards of a fair and transparent trial or was merely a formal procedure.[31]

6. The Statute of the Court gave the Security Council a larger role than justified. Take the case of Sudan, for example: according to articles 18(b) and 53 the Prosecutor has to notify the State in concern, and so there is some space to prove judicial competence and willingness in line with the complementarity principle.

7. From an Islamic point of view, the criticism can be raised that the Court excludes the death penalty. Most countries committed to the ICC oppose the death penalty and thus the penalty was omitted.[32] In certain Islamic and Arabic countries and in America too the death penalty is recognized and practiced. Therefore the description of the death penalty as inhumane is unacceptable. A Presidential statement was issued at the Rome conference and was annexed to the Statute as an obligatory component, which allowed a more variable interpretation of the circumstances permitting countries to execute the death penalty without it being considered an inhumane violation.

8. Amnesty : The ICC does not acknowledge the right to grant amnesty for crimes. In Islamic countries Heads of States have 'the right' to grant amnesty. The ICC has no police or prisons and depends on member countries to execute penalties. States do not have the right to alleviate or ameliorate punishments issued by the ICC. On the other hand, rulings of the ICC are not subject to principles of national constitutions, since their source is not a national judiciary.

9. Article 120 of the Statute stipulates that no State Party is permitted to make any reservations to the Statute once signed and ratified, making the Statute a take it or leave it notion.

10. The Statute allows the ICC and the international community to interfere in internal conflicts, but the international community is already interfering in internal conflicts, not only in Sudan, and therefore the matter is not solely related to the ICC. The Security Council will always interfere irrespective of whether the country is a State Party to the ICC or not.

29. Article 27 of the Statute provides that a person may be brought before the Court irrelevantly of his or her official capacity and/or immunities he or she enjoys under national or international law.
30. Article 29 of the Statute.
31. Article 20(3)(b) of the Statute.
32. Article 77(1) of the Statute provides for two principal penalties which the Court may impose: imprisonment for a specified number of years (30 years maximum) or life imprisonment in cases of extreme gravity. Additionally, in accordance with Article 77(2) of the Statute, the Court may impose a fine or a forfeiture of proceeds, property and assets derived directly from crime.

Questions and comments

The issue of national sovereignty should not be a pretext for state crimes. Sovereignty is actually that of the people and not of the ruling regime. Intervention of the Security Council is not beyond international law since the Council is an organ of the UN and countries are members of the UN, even those countries not State Parties to the ICC are under authority of the International Community and the Security Council. The competence of the national judiciary can be qualified by reference to prior cases registered by the civil society or otherwise. Surrender of citizens is actually possible since there is no national law in Sudan that precludes surrender of citizens to the ICC, the law remained silent on this issue, it only states that you cannot surrender your citizen to another country and therefore the matter is feasible. The Prosecutor notifies the country in question as a notion of courtesy, if the country however has the right to refuse international investigation and entrance of the Prosecutor remains yet to be seen.

As long as the Security Council has the authority to refer cases to the ICC irrespective of the ratification status of a country, the principle of voluntary signing and ratification of the Statute is practically lost. Countries should better sign and ratify the Rome Statute in order to participate actively in the inevitable procedures and processes of the Court. The principles of the ICC related to immunities and intervention into national matters go back to the Nuremberg trials and are part of international customary law, further strengthened by the UN Human Rights Committee.

The reservations mentioned contradict the principles of human rights, the ICC has acknowledged and confirmed the equality of all human beings. In fact sovereignty is an attribute of peoples and not of Heads of State.

The major criticism towards the Court is related to sovereignty, Arab countries have refused to sign and ratify the Rome Statute with the exception of Djibouti and Jordan. Do we wish to force countries to sign the agreement or is it our pledge to prevent the escape of criminals from trial? The ICC was established in the settling of conflict between the US and Europe. As an Islamic country we oppose the equation of willing and forced drunkenness. The alternative to the ICC is to include these international crimes in our national law. The ICC is currently functioning as a State and insofar surrender of citizens to the ICC is a breach of national sovereignty.

2. The Sudanese Government and the ICC; the necessity of differentiating between two positions

Mr. Kamal al-Jizouli, Lawyer, Writer & Human Rights Activist

Kamal al Jizouli
Lawyer, writer and human rights activist

I will focus on the problems between the Government of Sudan and the international bodies calling upon a referral of the situation in Darfur to the ICC, namely the Secretary-General, the Investigation Committee, the Security Council, the ICC Prosecutor, the ICC itself and all the international institutions in favor of Sudan's cooperation with the ICC. Actually I am not much concerned with the Sudanese Government's protest against the referral. In fact it has the right to do so, if that dissent is expressed within established international frameworks or if there is consistency between the State's position and measures it has already sought in this respect. For instance, it could have tried to make use of article 16 of the Rome Statute to convince the Security Council of a deferral;[33] or to convince the ICC that preconditions as to unwillingness or inability of the State to track down and bring to court those indicted are not applicable therein.

Taking any of these measures would have been explicable. Instead, which I personally find really exasperating, the Sudanese State has put forward a vague position. Political arguments were raised about the ICC being an imperialistic tool, devised only for the purpose of hegemony, on the basis

33. Article 16 of the Statute permits the Security Council to prevent and/or suspend investigations and prosecutions under the Statute for a renewable period of 12 months.

of international arrogance and double standards. At the same time, a keen Prosecutor was making serious efforts to formulate a legally based official response.

It is time to perceive the ICC as a former humanitarian dream that has now become a reality, rather than continue to focus on concerns about an imperialist plot. The creation of the ICC was undoubtedly sought by all peoples and nations, and was supported through popular campaigns along with organizations of civil society - which are still urging further signings and ratifications of Rome Statute 1998 as is the case with Sudan.

This is a complicated issue but it requires Sudan to adopt a consistent position: at the political level, on one hand, the question arises as to whether Sudan is a State Party in the international community or a dissenter. Of course we all know and have witnessed the consequences of a dissident Libya. On the other hand, the State's legal conformity will be in question here in view of the fact that Sudan signed the Rome Statute in 2000.

The situation needs to be addressed in a lucid manner instead of continuing to raise pointless arguments about non-credibility. As a signatory State to Vienna Convention,[34] Sudan is thereby held accountable, which implies not only compliance, but also abstinence from any acts discouraging or obstructive to the implementation of the Agreement, until it either ratifies or walks out on it.

Assuming Sudan has reasonable basis to protest that its non-ratification renders it unbound by the ICC, we will have to deal with the fact that the referral was not raised under article 13 (a) of Rome Statute [which authorizes a State Party to refer a situation to the Prosecutor], nor was it raised pursuant to article 13 (c) [whereby the Prosecutor determines that there would be a reasonable basis to commence an investigation]. Evidently the Security Council forwarded the referral to the Prosecutor, acting under Chapter VII of the Charter of the United Nations read with article 13 (b). Invoking signing or ratification would be inappropriate at this point as we are here facing a delicate legal situation, i.e. a referral by the powers of the United Nation's Security Council.

A resolution may consequently be issued to take effective collective measures for the prevention and removal of threats to international peace and security, ending in the deployment of the UN's armed forces.

The Security Council may as well resort to non-military measures such as instructing Member States to impose transport or economic sanctions upon a specified State. Any Member State having the least good judgment would adhere to such a resolution once it is issued. Even the most dear friends would then turn a deaf ear as no one is likely to defy the Security Council, given the current stipulations of the new world order.

Once again, the establishment of the International Criminal Court should be considered as a great step forward, indicating profound dedication throughout decades of human strife, especially during and after World War II. The outcomes of such early endeavor were in essence the principles of International Humanitarian Law, laws and customs of war, the accumulation of a great deal of laws and the establishment of the concept of international criminal liability in contrast to civil accountability dealt within the context of the International Court of Justice [where States litigate matters relating to their disputes as States].

The development of the notion of international criminal liability and the maturity of customary international law backed the call for establishing an international judicial institution. As World War II wound to a close, public opinion was increasingly keen on criminal prosecution and laid the groundwork of the International Military Tribunals enacted by the Allies at Nuremberg and Tokyo. Although these initial efforts to create an international criminal court following World War I were unsuccessful, they were partially materializing in the aftermath of World War II.

Next came the creation of the Tribunal for former Yugoslavia and then the Rwanda Tribunal, which we have witnessed in the 90s. Such evolutions set the stage for founding a permanent institution of international legal systems, which ultimately culminated in the signing of Rome Statute, the cornerstone of the International Criminal Court.

I conclude by advising the Sudanese State to avoid duality as to its discourse, to address the situation within the established legal framework and to cooperate with the ICC.

The Minister of Justice had been relentlessly underlining the competence of the Sudanese judicial organs until recently in a meeting with the Advisor to the UN's Secretary-General, [see al-Ray al-A'am Daily, Sep. 28th] he stated: "Many difficulties

34. Article 18(a) of the Vienna Convention on the Law of Treaties of 23 May 1969 obliges the States, which have signed, but not ratified a treaty, to refrain from actions depriving the treaty of its object and purpose.

hold back efforts to track the criminals. Sizable numbers had fled, taking refuge between their tribes. It is difficult to trace them as they are in constant move, even the witnesses sometimes run for their lives".

As if this was not enough, the Minister of Justice asked the Advisor to compare this failure to the unsuccessful attempts of Blair's Administration in the detention of the alleged London bombers. Apparently the Advisor will take no heed as it is certainly not his business to engage himself in drawing comparisons between the two cases, not to mention that the Minister of Justice was offering crystal clear evidence of the State's inability to track down the criminals, which is exactly the criterion on which the referral to the ICC is based in order to exercise its jurisdiction pursuant to article 17 (a) of Rome Statute! A statement that, I believe, will incur a lot consequences.

Questions and comments

- Is it true that all resolutions of the Security Council are obligatory; let us consider for example resolutions of the Security Council pertaining to the Arab-Israeli conflict, these were never implemented?

- To many observers signing of the Rome Statute by Arab countries is a further expression of international hegemony and a clear breach of their national sovereignty.

- It is known that the Vienna Convention allows countries to review newly signed agreements and express relevant reservation, I guess the same clause applies to the Rome Statute.

Responses

Mr. Kamal al-Jizouli

The Prosecutor mentioned that his office is preparing legal arguments to present to the ICC in order to qualify the capacity of the Sudanese judiciary, however any argument is already defunct if the admission is made that the State is unable to contain and arrest criminals in Darfur. Once again, what is the relationship between the London bombings and the case of Darfur? The Rome Statute differentiates between terrorism, discontent, rioting and so forth and between systematic and widespread conflict as the case is in Darfur. The ICC is obviously and according to its recognized Statute not concerned with isolated events.

I agree with the Prosecutor's perception of sovereignty. Procedures taking place on international level may appear to the layman as breaches of national sovereignty, but the case is wholly different; we are part of the International Community and members of the United Nations and its organizations, therefore yielding to and participating in decisions and policies of the International Community is on a certain level a practice of our national sovereignty.

The inclusion of international crimes into our national legislation is definitely important. Concerning the Special Court in Darfur, it prosecutes crimes included in the traditional Sudanese penal code and has nothing to do with international crimes, it should have included crimes mentioned in the four conventions, in that manner we could have convinced the ICC of our capacity, therefore criticisms of Annan's Advisor towards the Special Court in Darfur are justified.[35] The fact that Sudan has already signed the Rome Statute obliges the Sudanese State to abstain from any steps that present obstacles to or oppose the Statute, as set forth by the Vienna agreement. We are members of the International Committee and therefore we have duties and rights, a matter of our concern has been referred to the ICC, either we respond rationally or we just turn a blind eye, which is a vain and senseless undertaking.

Who said that the international law is ideal? It contains more politics than justice, and Sudan, as a marginal country, has no option but to manoeuvre rationally. Iran for example tries to deal rationally with international resolutions. We have to maintain political realism consistent with our capacities; mixing up of papers and illusions are of no use. We cannot afford to follow the Gaddafi example.

The condition for valid complementary jurisdiction of the ICC is the inability or incapacity of the national judiciary and not necessarily collapse and anarchy as the case is in Somalia. Declaration of the unwillingness to cooperate is sure to open

35. Mr. Juan Mendez, Special Advisor to the UN Secretary General, was quoted as follows: "We observed the first decisions and trials of the special court that they have created and we're very disappointed they deal with cases that are completely marginal to the problem, that have nothing to do with what happened at the peak of the conflict in 2003-2004, and that there is no clear rationale for crimes that seem to be common crimes have been brought to the Special Court" (Situation in Darfur, Sudan, is worsening, UN genocide expert warns, 10 October 2005, http://www.un.org/apps/news/printnews.asp?nid=16164).

the doors of hell and set the country under mercy of Chapter VII of the UN Charter.

As long as a State has signed an international agreement it is in no position to set obstacles before its implementation, without prejudice to the right to pledge for amendments or express reservations.

Dr. Abdalla Ahmed Mahdi

The observations you have mentioned could as well be called a close in favor of the ICC. We have organized a workshop at the Ministry of Foreign Affairs regarding the ICC. After thoroughly scrutinizing the odds, attendees were asked to give their opinions as to how Sudan was supposed to respond. Recommendations were as follows:

- Notwithstanding its shortcomings, the Court is bound to address the inevitability of an all-inclusive employment of its Statute in full capacity, despite the current political leverages. On the other hand, the persisting skeptical position on the part of Arab States, which have remained aloof as regards the ICC, is indefensible since this Statute, though not without serious flaws, was the best that could be attained. We believe that the establishment of the ICC has been an exalted venture second only to the formation of the United Nations.

- Necessarily, we should be careful as to the involvement of politics here. We are concerned with the Court's integrity, transparency and professionalism. There is a need to safeguard the ICC against member States, the United Nations and the Security Council. To this end, adjudication with regard to the Darfur case represents a vital test of the Court. The outcome will inevitably be seen as a demonstration of whether the oft-repeated commitment to the rule of law is genuine.

- The argument regarding conditions such as inability or unwillingness involves both the Court and national customary laws, though it will be the Court's task to issue a final word in this respect. Speaking of sovereignty entails speaking of ability. If you are unable, you cannot evidently claim sovereignty. We can take Somalia as an example of total administrative and judicial collapse. Sudan as a sovereign State is obliged to prove its aptitude to maintain justice and equality for its citizens. It is a matter of utmost significance; the State's judicial and administrative faculties are closely associated with its sovereignty. Sudan, unlike the disintegrating State in Somalia, is still intact and capable of dispensing justice.

3. National Legislation and the ICC

Dr Muaz, Ministry of Justice

The Sudanese penal code incriminates many of the crimes included in the Rome Statute e.g. abduction, rape and banditry. If we however compare the Statute and Sudanese laws we are certain to find some differences.

In essence, Sudan is under no commitment to oblige by the Rome Statute, because Sudan has not ratified it, despite taking part in its drafting. On this basis the Rome Statute cannot be considered part of the Sudanese national law. We should not ignore the fact that most if not all the crimes listed in the Statute are mentioned elsewhere in international agreements to which Sudan is a State Party, e.g. the four Geneva Conventions, the international conventions on genocide, torture and slavery. Sudan has ratified these agreements and thus they have become integral part of Sudanese law according to legislation passed by the National Council.

A further note is necessary, the national judiciary cannot immediately implement some of these agreements; they only become law once they are ratified and legislation to implement that treaty. This applies most to agreements of a criminal nature, since the judiciary cannot implement such an agreement unless legislation is passed to that effect defining not only crime and criminal intent, but also the applicable penalty. If we consider all international agreements on war crimes or crimes against humanity or genocide we find no definite penalties, the agreements rather speak of serious punishments.

On another level, there is an obvious difference between individual criminal intention pertaining to standard criminal acts under national law and the criminal intention suggested in the Statute. If we consider murder in criminal law and as a crime of war for example; the latter is mass murder and a violation of international humanitarian law within an international or internal conflict. Moreover, whoever commits the crime has to be aware that his doing is part of a conflict. Genocide is a crime of mass murder; it differs though from mass murder as stated by national law and also from enslavement.

There is also a difference between incrimination according to national law and incrimination in international agreements: according to national law only the individual directly

responsible for a certain crime shall be held accountable for that crime, whereas international agreements (and the Rome Statute) seek to prosecute superiors and leadership, i.e. a commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, as a result of his failure to exercise control properly and supposing his knowledge.

Sudan took an active part in drafting the Rome Statute, however it has not ratified it. On the other hand, crimes listed in the Statute are mentioned elsewhere in agreements to which Sudan is a State Party and have thus become part of Sudan's legal system. Sudan has established an independent national tribunal to deal with the crimes committed in Darfur, as well as a higher court of appeal, in addition to a new Prosecutor's Office for crimes against humanity, including all the crimes in the Statute. We face a problem regarding the rulings of the tribunal, since they differ from those defined by the Statute, and therefore really require amendment.

The tribunal cannot, of its own motion, define accusation and modify articles of law; that is beyond its mandate. The tribunal simply accepts the cases handed to it according to certain rules and regulations.

We are currently striving to amend our national criminal law in order to include all the crimes mentioned in the Statute and we will continue with this effort.

VII - SESSION 4 - SITUATION IN DARFUR AND VICTIMS' ACCESS TO JUSTICE; THE COMPLEMENTARY ROLE OF THE ICC

1. The Security Council referral to the ICC of the Darfur situation

Mr. Ali Agab, Khartoum Center for Human Rights and Environmental Development

Referral of the Darfur case to the ICC by the Security Council took place under Chapter VII of the United Nations Charter. On this basis the resolution[36] raised questions of sovereignty and complementarity. The background to the resolution is the report of the Commission of Inquiry authorised by the Secretary General to investigate the crimes committed in Darfur. The Committee sought to define and determine identity of perpetrators and qualify the nature of the crimes, additionally to assess the capacity, readiness and willingness of the Sudanese judiciary to address these crimes.

Reasons for referral to the ICC:

- The international nature of the crimes: since state personnel are allegedly involved in the crimes, jurisdiction is better sought on an international level.

- The weak and fragile Sudanese legal system: there are definite discrepancies between the Sudanese legal system and internationally recognized principles and standards of justice. The Sudanese law does not include the crimes in question; moreover the judiciary system is both incapable and unwilling to investigate these crimes. A number of Sudanese laws contradict and oppose principles of human rights, and since Sudan has not ratified the Rome Statute, there was no other channel to refer the case to the ICC except the Security Council under Chapter VII.

Obviously, the first issue to be raised was the question of complementarity. In contrast with Rwanda and the former Yugoslavia where international tribunals had primacy over national courts, the ICC is subsidiary to national judiciary systems, thus opening the door for development and improvement of national legislation in order to meet international standards rather than set an obstacle before effective proceeding of national justice.

In the current case of contradiction between the Sudanese State's interests and the principle of complementarity the ICC maintains jurisdiction, such is also the case if mock-trials are held that do not comply with international standards of justice. In practice, even the Special Court for Darfur does not include in its basic system crimes against humanity, war crimes, and genocide. The Government of Sudan is adamant about prosecuting alleged perpetrators before national courts, however the Sudanese legal system is clearly incapable of such an undertaking.

2. Legal effect of establishment of the ICC on internal legal hierarchy

Dr. Abdelmon'im Osman Mohamed Taha, Advisory Council for Human Rights, Ministry of Justice

The ICC is concerned primarily with the issue of international criminal responsibility, an undoubtedly important principle in the life of any community. Without going into the details, for a long time only States as such had the right to punish criminals and considered it an essential component of sovereignty.

Following the Nuremberg tribunals a number of international conventions were concluded with a view to consolidate the principle of international criminal responsibility, thereby making an individual a subject of international law. Within the framework of the UN, attempts were made to build up an international system of justice, though it remained a voluntary tool, which countries were not obliged to abide by. Then came the Tribunals for Rwanda and the former Yugoslavia and, in their aftermath, the establishment of the International Criminal Court. The ICC is more or less a compulsory instrument of international law, its Statute sets out certain duties for member and non-member States; however it did make an effort to strike some form of a balance by giving priority to the national judiciary by virtue of the principle of complementarity. It is clear that the ICC is not an element of the United Nations system.

The ICC can be triggered by referral of a case by the Security Council, implying that the Court has lent itself to political influence by the biggest political organization in the world, namely the UN. The importance of article 16 is exemplified here, insofar as it provides that the Security Council can suspend the investigations of the Court for one year, i.e. the Security Council recognizes that there are political factors involved, which may possibly delay the Court's proceedings.

36. UN Security Council Resolution 1593 (2005), 31 March 2005, Doc. S/Res/1593 (2005).

Referral of a certain case does not immediately imply its admissibility; it is the Prosecutor who has to carry out the primary investigations necessary to determine admissibility of a case. If the Prosecutor decides that a case is or would be admissible - in the case of Darfur the key issue is that the national courts are neither competent nor willing to investigate the crimes falling within the jurisdiction of the ICC - he can then commence his investigations. In this process the findings of Cassese's commission (International Commission of Inquiry on Darfur)[37] are of no significance.

For the first time in history of the UN the Security Council issued three resolutions against one country within one month. The one relevant here is Resolution 1593; in its second paragraph there is reference to article 16 of the Rome Statute, namely that no investigation or prosecution may be commenced or proceeded with for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the UN Charter, has requested the Court to that effect. We must understand that referral of the case to the ICC is not equal to referral of the list of alleged perpetrators in Cassese's report. This list is not at all binding on the Court, even the Security Council did not mention it in its Resolution 1593, where it is stated that the Security Council refers the situation in Darfur since June 2002 to the Prosecutor General of the ICC. The Prosecutor General was thus given full liberty in dealing with the case.

As we all know, the African Union has a major role to play in Darfur; the Union presented actual proposals concerning the dispute over jurisdiction between the Sudanese judiciary and the international legal system, suggesting to create an African court, however this proposal was refused. Instead the African Union was encouraged (article 3 of Resolution 1593) to discuss practical steps that would facilitate the work of the Prosecutor and the Court in the region including the possibility of holding local negotiations. Moreover, the Resolution mentioned internal reconciliation between the tribes as a most crucial element of the peace process, which the Security Council considered an important and complementary component of international justice, as stated in article 5. I think these are the two most positive articles in the resolution.

Negative points that can be criticized pertain to the fact that Sudan has not ratified the Rome Statute; nevertheless the Security Council does have certain authority over States and they have to abide by its resolutions. In particular, the Council in all its resolutions on Sudan takes note of the allegation that the situation in the country is still a threat to international peace and security.

The Government has already taken a number of positive steps, among which is the establishment of a Special Tribunal for Darfur. I think people should abstain from political bargaining on this matter. Referral of the Sudan case to the ICC will considerably affect the judicial system of the country and its integrity for generations to come. We, in the Advisory Council for Human Rights, took part in and followed the work of the UN Commission of Inquiry. We dealt objectively with the Commission, however it somehow gave no consideration to our documents and reports, as well as to the breaches committed by the other side of the conflict. The Government and the Advisory Council have repeatedly admitted the fact that there have been grave violations of human rights as well as war crimes in Darfur; documented by the report of the National Commission of Inquiry headed by Dafalla al Haj Yousif. Regarding crimes of rape, a large number of prison sentences have already been handed. I cannot conceal the fact that we face a great number of problems and obstacles, including those of an official nature; however, they do not represent the position of the Government of Sudan.

3. National and international remedies for victims of torture

Mr. Lutz Oette, Redress Trust

The purpose of reparation is the restoration of the situation to the state before the violation occurred, it is a basic concept of justice relating to the victims and to their beneficiaries. The right of reparation for human rights violations has been recognized in international humanitarian law, international treaties and customary international law at large and has been recently reaffirmed by the Human Rights Commission as a basic principle and guideline.

The victim's corresponding right to reparation entails two elements: a procedural one pertaining to effective remedy for the wrong done and a substantive one, which is the right to various recognized forms of reparation: restitution, compensation, rehabilitation, satisfaction and guarantees to non-repetition.

37. Report of the International Commission of Inquiry on Darfur to the Secretary General pursuant to Security Council Resolution 1564 (2004) of 18 September 2004, 25 January 2005, Doc. S/2005/60.

Satisfaction refers to a broad range of measures such as public acknowledgment of violations committed, apology of the perpetrators and accountability. Guarantees of non-repetition pertain to the state responsible for the violations; it has to take constitutional and legal steps to avoid any repetition of the violations committed.

Concerning national remedies in the Sudanese context, Sudan has become party to a number of relevant international treaties: the International Covenant on Civil and Political Rights, the African Charter, the Geneva Conventions, the Genocide Convention and so on. It has however not ratified some other conventions, e.g. the Rome Statute for the ICC and the Convention against Torture. When we look at the obligations that Sudan has incurred there are some obvious shortcomings that we have already highlighted in the report, when it comes to providing remedies for the victims of violations. One of these we have already considered, namely the lack of implementing legislation. In addition there are a number of international crimes that are not fully reflected in Sudanese criminal law. The way that crimes, like the crime of torture, are phrased in the relevant provisions does not fully reflect international standards. It remains to be seen whether it really does in practice. There are also a number of laws that are incompatible with Sudan's obligations under international law, particularly the obligation to investigate serious violations of human rights promptly, harshly and effectively, and to punish and prosecute any perpetrators who are guilty of such violations. I also have in mind the various immunity laws according to which any official who is accused of a crime can only be prosecuted if there is a permission to do so from the head of forces or a designated person. These laws have contributed to effective impunity because in a number of cases these permissions have been denied. There are some further factors contributing to impunity that we have identified in the report such as lack of a satisfactory complaint procedure, access to lawyers and concern about safety following lodging of a complaint. These reflect the broader problem of an inadequate and lacking judicial system. There is an ingrained culture of impunity here that casts shadows on the government's ability to prosecute international crimes in Sudan.

I know that a number of steps have been taken, but will they be sufficient to address these various shortcomings? In the face of this I think the Government of Sudan has to look closely at laws that need to be changed and to combat immunity. There is also a role for civil society to enter into a dialog with the government on these issues and to report on the progress made in the prosecution of perpetrators, and steps to tackle shortcomings identified such as bringing constitutional challenges against impunity.

Concerning international remedies, until now the African commission is the only individual crime procedure that Sudan has recognized, there have been only a handful of cases that has been raised before the commission in respect of Sudan, which is somewhat surprising. Lawyers in Sudan have not taken full advantage of this; they have to bring cases to the commission and to public record.

Regarding the reparation procedure of the ICC, victims of international crimes such as those committed in Darfur can apply for reparation before the ICC, although the reparation regime of the ICC has not yet been fully developed. The principle is that any individual perpetrator should pay compensation, like other forms of reparation. Alternatively the victims can receive reparation - compensation from the trust fund, which is currently being set up. It depends though on voluntary contributions. In the case of Darfur there will be problems in terms of full reparation regarding the number of victims and the scope of the damage in that context. So there are practical difficulties, but I think the ICC after coming this far is really in a position to provide at least some form of reparation and justice to victims of violations in Darfur. However,ultimately, as I mentioned, it is the responsibility of the Government of Sudan to remedy these violations and to provide full reparation in line with international standards.

4. From witness to victim status: victims' rights before the ICC

Ms. Jeanne Sulzer, FIDH International Justice Director

I will deal with the issue of victims' rights before the ICC. I must say though that this presentation is rather technical in nature, since it handles different texts and instruments in this regard. These are either components of the Rome Statute, the Rules of Procedure and Evidence, Regulations of the ICC or the draft regulations of the Registry, to be adopted at the next Assembly of States Parties on the 28th November 2005.

The ICC is unique in its recognition of victims' rights, due to the fact that the recognition of individual criminal responsibility at the Nuremberg Tribunals 1946 did not entail recognition of an independent status for victims. It is only since the adoption of the Rome Statute in 1998 that victims have been given an independent status. The Rwanda Tribunal and the Tribunal for the former Yugoslavia as well as the so called third generation tribunals, e.g. Sierra Leone,

recognized victims only as witnesses, they could appear before the court to give testimonies and help in the establishment of truth, but not as victims entitled to participation and reparation. Obviously the ICC is a great leap forward.

I will try to describe what type of participation is envisaged in the Rome Statute. The first type of participation, discussed yesterday, is that victims can send information to the Prosecutor (article 15), and the Prosecutor can decide to open an investigation on the basis of this information, once he gets the authorization of the Pre-Trial Chamber. Further participation is envisaged in article 68 paragraph 3 of the Statute, that reads: "Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings".

The *definition of victim* has been one of the main issues of negotiation. Rule 85 of the Rules of Procedure and Evidence defines a victim in a very broad manner, which is a very interesting and acceptable definition: "victims are natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court".[38] According to this definition both physical and mental prejudice can be taken into account, it also means that all direct and indirect victims are entitled to participate before the Court. The problem is that for various practical reasons not all victims can actually appear before the Court, therefore there has to be some governing mechanism. The first question that comes to mind is when can a victim apply to appear before the Court, before even opening an investigation or only after issue of arrest warrants? Regulation of the Registry 115 states that application can be forwarded at any stage of the proceedings. The victim must fill in a rather complicated application form, and this is a point for criticism, the form must contain questions about the person and others about the alleged perpetrators, the context and the whereabouts of the crime; whoever took the testimony has to be stated, and very importantly the victim has to determine whether he or she wishes the information submitted to be disclosed to the Prosecutor, defense and public. It is the role of NGOs and lawyers to transmit information to the victims in this regard and it is a role recognized in the rules of procedure and evidence.

Once an application has been submitted there is no guarantee that it will be accepted and that the victim will be able to appear before the Court. The Court's decision to authorize participation depends on a number of factors: first of all, the application form shall be given as copy to Prosecutor and defense, and they in liaison with the Chamber can decide to reject a victim's application, which means that very sensitive information about alleged crimes and perpetrators can pass unprotected, raising the issue of victims' safety and security, there are however means to request that a victim's security be preserved and guarded. Second, the application form has to be complete, failing which the victim may be prevented from full participation in the proceedings; this clause strikes a form of balance between prosecution and defense. The Chamber also has the right to reject an application on the basis that the person is not victim. If the application is rejected, the victim has the right to reapply at another stage of the proceedings. Therefore for participation of victims to be effective, efforts must be made in outreach to victims to enlighten them about their right to take part, the fact that they are entitled to legal representation and that they can benefit from some kind of protective measures.

According to the Rome Statute a victim has an independent status and is not a party, and on this basis is entitled to representation by a legal counsel. As in national codes the principle that applies is freedom of choice of legal representation. There is though a big difference in comparison with the accused: due to the massive nature of the crimes a new legal instrument has been devised under the name of "common legal representation"; the court can request and sometimes enforce victims to join together to be represented by one common legal representative,[39] which is a novel concept of the ICC that serves the good administration of justice, but as the same time raising the question of possible conflict of interests. In terms of qualification, a lawyer representing a victim at the ICC does not have to be registered at a national bar, but must have established competence in international or criminal law and relevant experience as a judge, prosecutor or advocate in criminal procedures.

The ICC has organized a system of *legal aid* that looks beautiful on paper, however in terms of budget it is a

38. Further, Rule 85(b) goes on to stipulate that "victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects of humanitarian purposes".
39. Rule 90(2) of the Rules of Procedure and Evidence.

complete disaster; there is almost no money being provided for victims' legal aid. This is a huge lobby issue that we partake in and there are NGOs already that have as mandate the assistance of victims who participate before the Court. In response to the issues of legal aid and common representation the Court has decided to create a Public Council for Victims and a Public Council for Defense: these are kind of in-house lawyers attached to the Registry who are supposed to be independent. They can provide assistance on an ad hoc basis to victims, and can help lawyers who appear before the Court by writing memoranda, explaining the jurisprudence of the tribunal and otherwise.

The issue of outreach has been the subject of debate for quite a while on the NGO scene, it is important to devise new means and fully use traditional ones according to the local conditions of each country in order to ensue that victims know and can exercise their rights.

Protection of victims is a major concern of the ICC, the general provision on the matter is article 68 of the Statute, which reads: "the Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses". Accordingly the Court has the mandate and obligation to protect victims and witnesses, particularly those who appear before the Court. There are a number of ways to do so, but evidently no magic ways, especially if the situation is very far from the Court. Article 87 of the Rules of Procedure and Evidence states that defense, prosecution, victims or witnesses can request a Chamber to order protective measures for victims, witnesses and other persons participating in proceedings before the Court, namely: omission of victim's name from public record, prohibition of disclosure of information to a third party, presentation of testimonies by electronic or other means, closed court hearings, and a set of procedures designed to help a person travel without risk from place of living to the Court and back in a so called "bubble of protection", which is right now only available for witnesses, but is envisaged for all victims who participate before the Court.

The Court provides for *reparation* to be given,[40] but the procedure is totally different and distinct from participation; reparation can be requested at any stage during the procedure and has many forms including restitution, compensation, rehabilitation and satisfaction. We all know that is it very difficult to obtain reparation from the individual person condemned with the crime. A trust fund has been created with the possibility of voluntary contribution;[41] this should distribute some kind of reparation that extends beyond only the victims who participate themselves before the Court.

5. Access to justice for victims of sexual violence

Mr. Izzeldin Osman, Lawyer, Writer and Human Rights Activist

The Government of Sudan has recently established a prosecutor's office for crimes against humanity, and as long as we are dealing with these crimes we have to verify the competence of our national law to address them and discern the amendments and improvements necessary to capacitate our legal system. According to international and national reports rape is one of the crimes that have been widely committed in Darfur.[42] As civil society organizations we are concerned even with aiding the Government in establishing human rights, because we are currently in the midst of a democratic transformation and there is a suitable atmosphere for cooperation between civil society and Government.

The concept of crimes against humanity is old; the term dates back to the year 1915, when the Allies issued a decision condemning war massacres and consolidating their commitment to bring the perpetrators to justice. International armed conflicts somehow clouded the concept and therefore the notion of genocide was coined, applicable both in the context of peace and war, whereas other crimes remained to a certain degree attached to armed conflict, e.g., war crimes, crimes against peace and crimes against humanity. However crimes against humanity only qualify as such if committed together with or as a consequence of the other two. At a later stage this last link with armed conflict was dissolved; even before establishment of the ICC, i.e. through the case-law of the Rwanda Tribunal and the Tribunal for the former Yugoslavia. Crimes against humanity were defined in article 7 of the Rome Statute, qualifying as such if committed in the context of a widespread or systematic attack against civilian population. Generally speaking, crimes against humanity have become independent of the notion of armed conflict and can occur at any time.

40. Article 75 of the Statute.
41. Article 79 of the Statute.
42. See, e.g., the Report of the International Commission of Inquiry on Darfur to the Secretary-General, cited above, § 186.

International law dealt with rape as a crime against humanity. The Rome Statute referred to the crime of rape in article 7(1)(g) together with other forms of sexual violence. There is though no clear definition of rape or sexual violence. The definitions of Rome Statute are developed in the "Elements of Crime", which shall assist the Court in the interpretation and application of articles 6, 7 and 8. The Statute's definition of rape pertains to physical assault of a sexual nature,[43] however there is no mechanical description of the act. The same approach is to be found in the Convention Against Torture, where the conceptual framework has priority over descriptive terms. In the same manner, the Statute provides no definition of sexual violence. The Rwanda Tribunal has ruled that sexual violence can occur without physical communication, e.g., compulsion of a woman to parade naked in front of a mass of people; it also gave a broad definition of rape not necessitating penetration. Here lies the major divergence between international and national laws; Sudanese law defines rape in article 149 of the Penal code as extramarital fornication or sodomy devoid of consent. The definition of the crime in Sharia which is the source of legislation for Sudanese criminal law relies on the principle of coercion and as such is a disputable issue taking into consideration the cases reported by international organizations in Darfur, namely that women seeking firewood outside the camps were forced to have sex otherwise denied access to firewood. The question is whether this may be considered as a form of "coercion" in Islamic jurisprudence? There is a number of cases in Islamic tradition where an open-minded approach allowed a broad interpretation of the concept, e.g., it is said that a woman passed by a herdsman in the desert and asked him for water, he refused her water unless she allows him herself, and she thereupon did, people disputed over the case and at the end Omer Bin al-Khatab decided that she was compelled to commit her crime and was therefore not guilty.

The Sudanese criminal law contains no concept of sexual violence, even in the case of much less harmless offenses than rape, it is women who are mostly incriminated. In short, Sudanese law does not recognize sexual violence and therefore is not in conformity with international law, on this basis it is difficult to speak of the national legal system's competence to deal with these crimes. In the report of the UN Commission of Inquiry[44] critical reference was made to the performance of the national judiciary regarding crimes of rape, mainly because the Sudanese criminal law sets "penetration" as a condition for rape and therefore the national commission dealing with cases of rape failed to present cases to the Prosecutor, since in most of them either penetration did not occur or was virtually impossible to verify. On the other hand the issue of evidence continues to be a major concern, since it quite unfair to request a woman to prove that she was raped, particularly that Sharia considers extramarital pregnancy evidence of the crime of extramarital fornication, to that effect, a woman who is a victim of rape can become herself accused of a criminal offense if she fails to prove that she was raped.

There are other procedural matters inconsistent with international standards that have been referred to in numerous reports: foremost the medical report, until recently it has been a condition for filing a case of rape, the Prosecutor however issued a statement canceling this condition, thus formally recognizing the reports issued by international organizations active in the region. This is one of the positive results of cooperation between the Ministry of Justice and the United Nations. Nevertheless it must be said that many cases of rape did not reach the judicial system because of this condition.

43. Article 7(1)(g) of the Elements of Crimes provides that crime against humanity of rape is committed when:
"1. The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body."
2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.
3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
4. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population."
44. Report of the International Commission of Inquiry on Darfur to the Secretary General, cited above, §§ 567, 568 and 580.

There are other problems related to the numerous and prevalent immunities, even if military personnel are brought to justice, the fact is that the laws remain dense with immunities, and while they are in force it is difficult to effectively prosecute the perpetrators.

I conclude by saying that Sudanese laws are neither substantively nor procedurally fit to address crimes of rape and sexual violence, and thereupon, significant amendments and modifications are necessary if the Sudanese State is sincere in prosecuting these crimes. On the background of the newly signed peace agreement there is a need to review Sudanese laws with the objective of bringing them in conformity with the Interim Constitution and with international law. To that end and within this review it is a must to cancel all immunity clauses; it is also essential to introduce the concept of sexual violence to Sudanese culture, public and legal. Moreover new mechanisms must be developed to deal with the crimes of rape from a social and a psychological aspect, together with procedures of reparation.

VIII - RECOMMENDATIONS OF THE WORKING GROUPS

Working Group (1): Relationship between the ICC and the National Judiciary

- In order to avoid political conflict on an international scale, it is mandatory to ratify the Rome Statute and to implement the crimes under its jurisdiction into Sudanese criminal law.
- Independence of the judiciary must be reaffirmed as set out in the Interim Constitution 2005, emphasizing the will and ability of the Sudanese State, technically and legally, to investigate crimes, prosecute alleged perpetrators and execute sentences.
- Legislation that regulates the functions of legal, judiciary and security institutions must be brought into conformity with the provisions of the Interim Constitution.
- Training of judiciary personnel should be conducted in conformity with internationally recognized principles of justice.
- In order to allow free and fair trials and thorough justice, perpetrators of crimes under the jurisdiction of the ICC have no immunity, therefore national legislation should be revised.

Working groups sessions

Working Group (2): Role of civil society organizations in campaigning for the ratification of the Rome Statute

- A committee made up of participants in the workshop should be created to initiate a campaign for awareness among civil society organizations.
- Objective information about the ICC should be disseminated in the media.
- Training on the Rome Statute and the ICC must be organized via seminars and workshops.
- Individual meetings with decision-makers to discuss the ratification of the Rome Statute should be planned.
- Other related international conventions, particularly those ratified by the Government of Sudan, should be promoted and implemented, and the Agreements on Privileges and Immunities of the ICC should be ratified.
- Sub-committees should be created in different states of the Sudan to raise awareness on the ICC.

Working Group (3): Ensuring victims' rights before the ICC

- Guaranteeing victims' rights during the investigation and trial phase pursuant to article 68 of the Rome Statute is of utmost importance.
- Effective protection of victims and witnesses is essential to the effective functioning of the ICC and to the effective implementation of all victims' rights.
- Victims should be granted access to the ICC, in order to participate before the ICC if they wish, and to exercise their rights including their right to appeal.
- Legal aid provided to victims by the Registry should be made available according to flexible criteria which take into account the concrete situation of victims, and widely enough to ensure effective participation of victims.
- Welcoming the right of victims to reparation, the participants underlined the need for victims to be granted the right to determine the type of reparation they will need.
- The importance of psychological and professional rehabilitation of victims should be highlighted.
- The existence and activities of the Trust Fund for victims should be rapidly made public.

ANNEX 1 : FIDH/SOAT PRESS RELEASE

fidh
Fédération internationale des ligues des droits de l'Homme

Sudan Organization Against Torture
SOAT

FIDH-SOAT workshop in Khartoum

Sudanese civil society urges the government to ratify the ICC Statute and calls for the creation of a national coalition for the ICC

Khartoum- 4 October 2005: The International Federation for Human Rights (FIDH) and its affiliate member, Sudan Organization against Torture (SOAT), together with its local partners, the Khartoum Center for Human Rights and Environment Development and the Amel Center for Rehabilitation of Victims of Torture, organized a round table on "International Criminal Court and Sudan - Access to justice and place of victims" in Khartoum (Sudan), October 2-3, 2005.

This round table was held in cooperation with the CICC, REDRESS, the International Human Rights Law Institute and the Sudanese Advisory Council for Human Rights.

This training and information workshop was of great importance as it was the first event in Sudan on this issue after the Security Council's referral of the situation in Darfur to the Prosecutor of the ICC. It also took place while serious violations of human rights and humanitarian law were resuming in that region.

90 persons attended the workshop, mainly representatives of the human rights organizations of the Sudanese civil society including a significant number of lawyers coming from all regions of Sudan, notably Darfur, as well as officials of the Ministry of Justice and Ministry of Foreign Affairs, officers from the military judiciary, and representatives of the European Union and of the United Nations Mission in Sudan (UNMIS).

The first day, national and international experts provided an overview of the law and the functioning of the ICC, on the on going cases before the ICC, and on the participation and protection of victims.

The second day, a very interesting debate arose between the participants on whether the Security Council's referral impedes Sudanese national sovereignty and about the complementarity principle, in particular with regard to the first cases brought before the Special Court for Darfur.

The main recommendations that came out of the three working group sessions were:
- the creation of a national coalition for the ICC aiming at the ratification of the Rome Statute by Sudan
- the need for a public campaign of information on the ICC system
- the need for training on international justice mechanisms
- the need to bring national legislation in line with the international human rights and humanitarian law standards.

ANNEX 2 : AGENDA OF THE ROUNDTABLE

Fédération internationale des ligues des droits de l'Homme
International federation of human rights
Federacion international de los derechos humanos
الفدرالية الدولية لحقوق الانسان

in coordination with

Coalition for the International Criminal Court

International Human Rights Law Institute

AGENDA

The International Criminal Court and Sudan: Access to justice and place of victims

Grand Holiday Villa
Khartoum - Sudan
2 October - 3 October 2005

2 October 2005
THE INTERNATIONAL CRIMINAL COURT

9:00 - arrival of the participants / distribution of the agendas and kit of documentation

9.15 - 10.30: Opening Speeches
Dr. Abdel MONEIM - Advisory Council for Human Rights
Her Britannic Majesty's Ambassador **Mr. Ian CLIFF** on behalf of the European Union
Mr. Hafez ABU SEADA, President of the Egyptian League for Human Rights, FIDH permanent delegate before the League of Arab States
Dr. NAGIB - SOAT / KCHRED

10.30 - 11.00 : coffee break

11.00 - 1.30 / SESSION 1 - THE LAW OF THE INTERNATIONAL CRIMINAL COURT

Chair : Mr. Amir SULEIMAN, KCHRED Chairman
Rapporteur : Ms. Limia AL JAILI, journalist, KCHRED

Historical overview of the ICC and the system of the ICC (jurisdiction, complementarity, trigger mechanisms)
Mr. Hafez Abu Seada, President of the Egyptian Organization for Human Rights, FIDH permanent delegate before the League of Arab States

Crimes within the jurisdiction of the ICC and the general principles of criminal law
Mr. Marceau Sivieude, Africa Program Director, FIDH

Questions and answers

The organization of the ICC and current challenges
Ms. Jeanne SULZER, International Justice Director, FIDH

1.30 - 3.00 - Lunch

3.00 - 500 / SESSION 2 - THE ICC TODAY

Status of ratifications and implementation of the ICC Statute (on behalf of Ms. Anjali KAMAT from the Coalition for the International Criminal Court)
and
The United States position and the ICC
Ms. Stephanie David, FIDH North Africa and Middle East Program Director, FIDH

The legal and political obstacles for ratification of the ICC
Dr. Abdallah Ahmed MAHADI, General Lawyer

Questions and answers

3 October 2005
THE INTERNATIONAL CRIMINAL COURT IN THE SUDANESE CONTEXT

Chair : Mr. Ali M. AGAB, KCHRED
Rapporteur : Dr. Murtada AL-GHALI, KCHRED

9.00 -10.30 - SESSION 3 - ICC AND SUDAN

National Legislation and the ICC
Dr. MUAZ, Ministry of Justice

The Sudanese government and the ICC, the necessity of differentiating between two positions
Mr. Kamal Al JIZOULI, Lawyer, writer & Human Rights activist

Questions and answers

10.30 - 11.00 : Coffee break

11.00 - 1.30 - SESSION 4 - SITUATION IN DARFOUR AND VICTIM'S ACCESS TO JUSTICE : THE COMPLEMENTARY ROLE OF THE ICC

The Security Council referral to the ICC of the Darfur situation
Mr. Ali M AGAB, KCHREDi

and Intervention of Dr. Abdel MONEIM, Advisory Council for Human Rights

National and international remedies for victims of torture
Mr. Lutz Oette, Redress Trust

From Witness to Victim Status: Victims' Rights before the ICC
Ms. Jeanne Sulzer, FIDH International Justice Director

Access to justice for victims of sexual violence
Mr. Izzeldin OSMAN, Lawyer, writer and human rights activist

Questions and answers

1.30 - 03.00: Lunch

3.00 - 4.30 WORKING GROUPS SESSION

There will be three different working groups (please register for one of them by the end Sunday October 2)

4.30 - 4.45 Coffee break

4.45 - 5.30: REPORTS OF THE WORKING GROUPS

Chair : Mr. Hafez Abu Seada, President of the Egyptian Organization for Human Rights, FIDH permanent delegate before the League of Arab States

5.30-7.00: CLOSING CEREMONY

Cocktail under the high patronage of the Advisory Council for Human Rights

ANNEX 3 : LIST OF PARTICIPANTS

N°	Name	Gender	Organization
1	Abdella Hamed Edreis	M	Military judiciary System
2	Abdelmoniem Osman	M	ACHRS
3	Abed Dala Elkarib	M	Sudanese Human Rights monitor
4	Abed Elkhalig Mohamed Shaib	F	GESCRS
5	Adel Abed Elhameed Adam	M	Military judiciary System
6	Adlan Elhardallu	M	Sudanese Human Rights monitor
7	Ahmed Kames	M	Khartoum lawyers network
8	Ahmed Omar Mohamed	M	Advocate - Juba
9	Aldow Hamed Aldow	M	Khartoum lawyers network
10	Ali Mohamed Agab	M	KCHRED
11	Amal Ahmad Mohamed Ali	F	Ministry of Justice
12	Amir Mohamed Suliman	M	KCHRED
13	Amira Abed Elkhalig	F	Khartoum lawyers network
14	Anneues Euerman	F	Netherlands Embassy
15	Anowr Abdalla Ahmed	M	Khartoum lawyers network
16	Delphine Carlens	F	FIDH
17	Ebtisam Kamil	F	Ministry of Justice
18	Edward Modesto	M	Advocate - Juba
19	Ehab Abed Elhamed Abd Elal	M	Police officer
20	Ehab Osman Mohamed	M	Khartoum lawyers network
21	Ehssan M. Elriah	F	UNMIS-HRP
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41	Jeanne Sulzer	F	FIDH
42	Katharine Pappas	F	Alternatives
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ANNEX 4 : ICC BACKGROUND NOTE: "VICTIMS' PARTICIPATION AND REPARATION", N° ICC2005.028-EN

Cour
Pénale
Internationale

International
Criminal
Court

BACKGROUND NOTE

No.: ICC2005.028-EN

The Hague, 11 August 2005

VICTIMS' PARTICIPATION AND REPARATIONS

As part of the ICC system, victims can send information to the Prosecutor asking him to initiate an investigation. There are also two important innovations with regard to victims. For the first time in the history of international criminal justice, victims have the right to participate in proceedings and request reparations. This means that they may not only testify as witnesses, but may also present their views and concerns at all stages of the proceedings. It is most likely that they would do so through legal representatives.

The role of victims in ICC proceedings complements the efforts undertaken by the Court to hold accountable individuals who are responsible for the most serious crimes of concern to the international community. The principle behind this is that true justice is achieved when voices of victims are heard and their suffering is addressed.

The ICC has jurisdiction over the crimes of genocide, crimes against humanity and war crimes committed after 1 July 2002 by a national of a State Party, or in the territory of a State Party, or subsequent to a United Nations Security Council referral of a situation where such crimes are alleged to have taken place.

Who is a victim?

Victims are individuals who have suffered harm as a result of a crime falling within the jurisdiction of the Court. In the event that property dedicated to religion, education, art, science or charity is damaged, organisations or institutions may also be considered victims.

What type of harm will be covered by the ICC?

It will be up to the judges of the ICC to determine the types of harm that will be covered. However, they are expected to include physical harm to a person's body; psychological harm, by which a person's mind has been affected by what he or she has experienced or witnessed; or material harm, by which goods or property have been damaged or lost.

How will the ICC assist victims?

To assist victims the Court has established the Victims Participation and Reparation Section (VPRS) and the Victims and Witnesses Unit (VWU), both within the Registry. The Registry is one of the organs of the Court, the others being the Office of the Prosecutor (OTP), the Presidency and Chambers of judges.

The VPRS informs victims of their rights regarding participation and reparations, and assists them in applying for participation in the proceedings or for reparations, or both. It also assists victims in obtaining legal advice and organising their legal representation. To identify and reach victims, the VPRS is actively developing relationships with victims' groups, NGOs and other national and international organisations, particularly in countries where the Court is active.

The VWU provides protection and psychological support to witnesses, victims who appear before the Court and others who are at risk on account of the testimony they have given. The VWU provides advice, training and assistance to other parts of the Court on how to ensure the safety and well-being of victims and witnesses. Special attention is given to the particular needs

of children, the elderly, persons with disabilities and victims of sexual or gender violence. The Unit is also responsible for witness protection programmes.

What is the role of victims in the ICC?

Victims can play a part in the following manner:
- By sending information to the Prosecutor regarding crimes they believe to have been committed;
- By testifying before the Court if called as witnesses;
- Where the victims' personal interests are affected, by presenting their views and concerns before the Court. Victims may do this from the earliest stages of the proceedings (for example, at a hearing where the Prosecutor asks for authorisation from the judges to begin an investigation, or when he asks the Court to confirm charges against an accused person) through to the trial and appeal stages.

How can victims participate in the proceedings in their own right?

Victims can present their views and concerns to the Court at all stages of proceedings where their personal interests are affected, and in a manner which is not prejudicial or inconsistent with the rights of the accused and a fair and impartial trial.

Applications for participation in the proceedings
Victims may apply to participate at any stage of the Court's proceedings by filling in the standard application form for participation. All applications are considered by the relevant Chamber of judges. The judges decide on the application of a victim, if the person has suffered harm as a result of the commission of a crime under the jurisdiction of the Court. The judges also decide at what stages the victims may present their views and concerns and in what manner they may do so.

Legal representation
Participation of victims in the proceedings will take place in most cases through a legal representative. Generally, victims will not have to travel to the Court if they do not wish to do so. Their legal representatives will present their views and concerns to the Court. Victims are free to choose their legal representative, who must be a person with extensive experience as a criminal lawyer, judge or prosecutor, and be fluent in one of the Court's working languages (English or French). The ICC will help victims to find a legal representative by providing a list of counsel. Although the Court's resources for legal aid are limited, the Court may be able to provide some financial assistance. There is also an Office of Public Counsel for Victims that will be available to provide legal assistance to victims without charge.

Where there are many victims, the judges may ask victims to choose a single common legal representative or team of representatives, in order to make the proceedings more efficient. If for any reason the victims are unable to appoint common legal representation, the judges may ask the ICC Registrar to do so. If the victims are not happy with the Registrar's choice, they may ask the judges to review it.

Notification
When a Chamber decides on the application of a victim and establishes the manner in which that victim is going to participate in proceedings in a particular situation or case, he or she will be kept informed of developments at each stage of the proceedings, including the dates of hearings, the decisions of the Court and any appeals.

How can victims request reparations?

Victims can request reparations for harm they have suffered as the result of a crime within the Court's jurisdiction. The Court may also decide to deal with reparations on its own initiative, even where victims have not submitted applications.

Victims can present their views on what form reparation should take, and the Court may order various types of reparation, including the following:

- Compensation, which generally means monetary compensation for moral, material and physical harm. This could include compensation for physical and mental harm, loss of earnings, pain, suffering and emotional distress and lost opportunities.

- Restitution, which aims to re-establish, as far as possible, the situation that existed for the victims prior to the harm they suffered. This may include restoration of property.

- Rehabilitation, which is intended to allow the victims to continue their lives as normally as possible. Rehabilitation may cover costs of medical, psychological or psychiatric care, as well as social, legal and other services needed to restore victims' well-being and dignity.

At the end of a trial, the Trial Chamber may decide to order a person convicted by the Court to make reparations to victims of

the crimes for which he or she has been found guilty. The Court may award reparations either on an individual or a collective basis, whichever is most appropriate for the victims in the particular case. An advantage of collective reparation is that it can help to provide relief to a community as a whole and to place its members in a position to reconstruct their lives. Centres that provide services to victims, for example, could be constructed or symbolic measures could be taken. Furthermore, ICC States Parties have established a trust fund for victims of crimes within the jurisdiction of the Court and their families to provide some form of reparation even when the convicted person does not have sufficient assets.

What is the Trust Fund for Victims?

The Trust Fund was established by the ICC's Assembly of States Parties in September 2002, to complement the Court's reparations function.

The funds collected by the Trust Fund for Victims will come from two main sources. Firstly, funds collected through fines, forfeiture and awards of reparations ordered by the Court against convicted persons, and secondly, voluntary contributions from States, individuals and organisations.

The Trust Fund is independent from the Court and has a dual role. It may be asked by the Court to help implement reparations awards ordered against a convicted person. It may also use the contributions it receives to finance projects for the benefit of victims. To enable the Trust Fund for Victims to operate, a Board of Directors has been established. The Board decides how and when to dispense this assistance. The current members of the Board are: Her Majesty Queen Rania Al-Abdullah of Jordan, His Excellency Dr Oscar Arias Sanchez from Costa Rica, His Excellency Mr Tadeusz Mazowiecki from Poland, Madam Minister Simone Veil from France, and His Eminence Archbishop Emeritus Desmond Tutu from South Africa, who represent their respective regions.

Protection and support for victims and witnesses

The ICC is obliged to take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses.

When victims testify as witnesses before the Court, the VWU provides administrative and logistical support to enable them to appear before the Court, and works to promote a setting in which respect for the witness is guaranteed and in which the experience of testifying does not result in further harm, suffering or trauma. Psychosocial care and other appropriate assistance is also given to individuals accompanying the witnesses.

The Court will manage its contact with victims participating in the proceedings or claiming reparations in such a way as to limit any risk to victims or to others, and will handle information received from victims in strict confidentiality.

According to the procedures of the Court, applications for participation or reparations must be disclosed to the Prosecutor and the defence. However, applicants can request that the information they give to the Court not be disclosed, if they are concerned about the implications for their safety or the safety of others. They may also request that such information not be included in the public record of the proceedings. The judges will decide what steps to take in response to such requests, and may order measures to protect information provided by a victim or a legal representative.

* * *

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FIDH represents 141 Human Rights organisations

141 organisations

Albania-Albanian Human Rights Group
Algeria-Ligue algérienne de défense des droits de l'Homme
Algeria-Ligue algérienne des droits de l'Homme
Argentina-Centro de Estudios Legales y Sociales
Argentina-Comite de Accion Juridica
Argentina-Liga Argentina por los Derechos del Hombre
Austria-Österreichische Liga für Menschenrechte
Azerbaijan-Human Rights Center of Azerbaijan
Bahrain-Bahrain Human Rights Society
Bangladesh-Odhikar
Belarus-Human Rights Center Viasna
Belgium-Liga Voor Menschenrechten
Belgium-Ligue des droits de l'Homme
Benin-Ligue pour la défense des droits de l'Homme au Bénin
Bhutan-People's Forum for Human Rights in Bhutan (Nepal)
Bolivia-Asamblea Permanente de los Derechos Humanos de Bolivia
Brazil-Centro de Justica Global
Brazil-Movimento Nacional de Direitos Humanos
Burkina Faso-Mouvement burkinabé des droits de l'Homme & des peuples
Burundi-Ligue burundaise des droits de l'Homme
Cambodia-Cambodian Human Rights and Development Association
Cambodia-Ligue cambodgienne de défense des droits de l'Homme
Cameroon-Maison des droits de l'Homme
Cameroon-Ligue camerounaise des droits de l'Homme (France)
Canada-Ligue des droits et des libertés du Québec
Central African Republic-Ligue centrafricaine des droits de l'Homme
Chad-Association tchadienne pour la promotion et la défense des droits de l'Homme
Chad-Ligue tchadienne des droits de l'Homme
Chile-Corporación de Promoción y Defensa de los Derechos del Pueblo
China-Human Rights in China (USA, HK)
Colombia-Comite Permanente por la Defensa de los Derechos Humanos
Colombia-Corporación Colectivo de Abogados Jose Alvear Restrepo
Colombia-Instituto Latinoamericano de Servicios Legales Alternativos
Congo Brazzaville-Observatoire congolais des droits de l'Homme
Croatia-Civic Committee for Human Rights
Czech Republic-Human Rights League
Cuba-Comisión Cubana de Derechos Humanos y Reconciliación National
Democratic Republic of Congo-Ligue des Électeurs
Democratic Republic of Congo-Association africaine des droits de l'Homme
Democratic Republic of Congo-Groupe Lotus
Djibouti-Ligue djiboutienne des droits humains
Ecuador-Centro de Derechos Economicos y Sociales
Ecuador-Comisión Ecumenica de Derechos Humanos
Ecuador-Fundación Regional de Asesoria en Derechos Humanos
Egypt-Egyptian Organization for Human Rights
Egypt-Human Rights Association for the Assistance of Prisoners
El Salvador-Comisión de Derechos Humanos de El Salvador
Ethiopia-Ethiopan Human Rights Council
European Union-FIDH AE
Finland-Finnish League for Human Rights
France-Ligue des droits de l'Homme et du citoyen
French Polynesia-Ligue polynésienne des droits humains
Georgia-Human Rights Information and Documentation Center
Germany-Internationale Liga für Menschenrechte
Greece-Ligue hellénique des droits de l'Homme
Guatemala-Centro Para la Accion Legal en Derechos Humanos
Guatemala-Comisión de Derechos Humanos de Guatemala
Guinea-Organisation guinéenne pour la défense des droits de l'Homme
Guinea Bissau-Liga Guineense dos Direitos do Homen
Iran-Centre des défenseurs des droits de l'Homme en Iran
Iran (France)-Ligue de défense des droits de l'Homme en Iran
Iraq-Iraqi Network for Human Rights Culture and Development (United Kingdom)
Ireland-Irish Council for Civil Liberties
Israel-Adalah
Israel-Association for Civil Rights in Israel
Israel-B'tselem
Israel-Public Committee Against Torture in Israel
Italy-Liga Italiana Dei Diritti Dell'uomo
Italy-Unione Forense Per la Tutela Dei Diritti Dell'uomo
Ivory Coast-Ligue ivoirienne des droits de l'Homme
Ivory Coast-Mouvement ivoirien des droits de l'Homme
Jordan-Amman Center for Human Rights Studies
Jordanie-Jordan Society for Human Rights
Kenya-Kenya Human Rights Commission
Kosovo-Conseil pour la défense des droits de l'Homme et des libertés
Kyrgyzstan-Kyrgyz Committee for Human Rights
Laos-Mouvement lao pour les droits de l'Homme (France)
Latvia-Latvian Human Rights Committee
Lebanon-Association libanaise des droits de l'Homme
Lebanon-Foundation for Human and Humanitarian Rights in Lebanon
Lebanon-Palestinian Human Rights Organization
Liberia-Liberia Watch for Human Rights
Libya-Libyan League for Human Rights (Switzerland)
Lithuania-Lithuanian Human Rights Association
Malaysia-Suaram
Mali-Association malienne des droits de l'Homme
Malta-Malta Association of Human Rights
Mauritania-Association mauritanienne des droits de l'Homme
Mexico-Liga Mexicana por la Defensa de los Derechos Humanos
Mexico-Comisión Mexicana de Defensa y Promoción de los Derechos Humanos
Moldova-League for the Defence of Human Rights
Morocco-Association marocaine des droits humains
Morocco-Organisation marocaine des droits humains
Mozambique-Liga Mocanbicana Dos Direitos Humanos
Netherlands-Liga Voor de Rechten Van de Mens
New Caledonia-Ligue des droits de l'Homme de Nouvelle-Calédonie
Nicaragua-Centro Nicaraguense de Derechos Humanos
Niger-Association nigérienne pour la défense des droits de l'Homme
Nigeria-Civil Liberties Organisation
Northern Ireland-Committee On The Administration of Justice
Pakistan-Human Rights Commission of Pakistan
Palestine-Al Haq
Palestine-Palestinian Centre for Human Rights
Panama-Centro de Capacitación Social
Peru-Asociación Pro Derechos Humanos
Peru-Centro de Asesoria Laboral
Philippines-Philippine Alliance of Human Rights Advocates
Portugal-Civitas
Romania-Ligue pour la défense des droits de l'Homme
Russia-Citizen's Watch
Russia-Moscow Research Center for Human Rights
Rwanda-Association pour la défense des droits des personnes et libertés publiques
Rwanda-Collectif des ligues pour la défense des droits de l'Homme au Rwanda
Rwanda-Ligue rwandaise pour la promotion et la défense des droits de l'Homme
Scotland-Scottish Human Rights Centre
Senegal-Organisation nationale des droits de l'Homme
Senegal-Rencontre africaine pour la défense des droits de l'Homme
Serbia and Montenegro-Center for Antiwar Action - Council for Human Rights
South Africa-Human Rights Committee of South Africa
Spain-Asociación Pro Derechos Humanos
Spain-Federación de Asociaciones de Defensa y Promoción de los Derechos Humanos
Sudan-Sudan Organisation Against Torture (United Kingdom)
Sudan-Sudan Human Rights Organization (United Kingdom)
Switzerland-Ligue suisse des droits de l'Homme
Syria-Comité pour la défense des droits de l'Homme en Syrie
Tanzania-The Legal & Human Rights Centre
Thailand-Union for Civil Liberty
Togo-Ligue togolaise des droits de l'Homme
Tunisia-Conseil national pour les libertés en Tunisie
Tunisia-Ligue tunisienne des droits de l'Homme
Turkey-Human Rights Foundation of Turkey
Turkey-Insan Haklari Dernegi / Ankara
Turkey-Insan Haklari Dernegi / Diyarbakir
Uganda-Foundation for Human Rights Initiative
United Kingdom-Liberty
United States-Center for Constitutional Rights
Uzbekistan-Legal Aid Society
Vietnam-Comité Vietnam pour la défense des droits de l'Homme (France)
Yemen-Human Rights Information and Training Center
Yemen-Sisters' Arabic Forum for Human Rights
Zimbabwe-Zimbabwe Human Rights Association Zimrights

The International Federation for Human Rights (FIDH) is an international non-governmental organisation dedicated to the world-wide defence of human rights as defined by the Universal Declaration of Human Rights of 1948. Founded in 1922, the FIDH has 141 national affiliates in all regions. To date, the FIDH has undertaken more than a thousand international fact-finding, judicial, mediation or training missions in over one hundred countries.

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SOAT is an independent non-governmental human rights organisation established in 1993 working in Sudan and UK and has members worldwide. SOAT's primary objective is preventing torture and challenging impunity. SOAT works to rehabilitate Sudanese survivors of torture; provides legal assistance to survivors and individuals threatened with inhumane and degrading punishments; provides human rights education; researches, documents and campaigns against human rights abuses in Sudan on a national and inter-national level.

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