



Lack of Conviction

The Special Criminal Court on the Events in Darfur

A Human Rights Watch Briefing Paper

Executive Summary	1
Part I: The SCCED.....	3
Events Leading to the Establishment of Special Criminal Court on the Events in Darfur	3
Framework for Prosecution of Crimes in Darfur.....	5
The Legal Basis for the SCCED.....	8
The SCCED in Action: Judging Ordinary Crimes, Not Crimes against Humanity.....	10
Part II: The Obstacles	15
Legal Framework	15
Lack of proscription in the substantive law.....	15
Prosecuting on the basis of command responsibility.....	16
Scope of immunities.....	17
Legal impediments for prosecution of rape	19
Procedural Rights.....	22
Access to counsel.....	22
The right against self-incrimination	23
Admissibility of coerced statements	24
The Death Penalty and Corporal Punishment	25
Practical Obstacles: Lack of Political Will.....	26
Treatment of Witnesses and Victims of Sexual Violence.....	29
Conclusion.....	31

Executive Summary

On June 7, 2005, one day after the Prosecutor of the International Criminal Court (ICC) announced he was opening investigations into the events in Darfur, the Sudanese authorities established the Special Criminal Court on the Events in Darfur (SCCED) to demonstrate the government's ability to handle prosecutions domestically. The timing of the establishment of the SCCED belies a motivation for the establishment of the Court beyond that of offering accountability and justice to victims of war crimes in Darfur. Statements made by senior Sudanese government officials at the time made clear that one goal in establishing the SCCED was to divest the ICC of jurisdiction. A Ministry of Justice statement challenging the ICC's jurisdiction made explicit reference to Article 17 of the Rome Statute which requires the ICC to reject a case as inadmissible "if the State which has jurisdiction is investigating or prosecuting the case unless the State is unwilling or unable genuinely to carry out the investigation or prosecution."¹ Sudanese authorities have repeatedly stated they will not cooperate with the ICC because Sudan is capable of trying the cases in Darfur.²

The Sudanese authorities have had one year to demonstrate that the SCCED is an effective and meaningful forum where the perpetrators of serious human rights violations in Darfur can be brought to justice. The information Human Rights Watch has been able to gather on the Court's first year of operations indicates there is no genuine willingness on the part of Sudanese authorities to ensure that the perpetrators of the atrocities in Darfur are brought before the SCCED for prosecution. Nor is there evidence that the SCCED has the capacity to try these cases effectively even if appropriate cases are brought before it. The 13 cases brought before the SCCED to date have involved only ordinary crimes, such as theft, possession of stolen goods or individual murders unrelated to larger attacks. Sudanese authorities have failed to press charges before the SCCED for a single major atrocity committed in Darfur. No official

¹ "Sudan: Judiciary challenges ICC over Darfur cases," IRIN, June 24, 2005, [online], http://www.irinnews.org/report.asp?ReportID=47802&SelectRegion=East_Africa&SelectCountry=SUDAN (retrieved May 30, 2006). A recent ruling by Pre-Trial Chamber 1 of the ICC has indicated that for a case to be found inadmissible, national proceedings must encompass both the person and the conduct which is the subject of the case before the Court (International Criminal Court Decision concerning Pre-Trial Chamber 1's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, February 24 2006, para. 31).

² See "Sudan rejects handing over Darfur suspects," UPI, April 2, 2005 [online] <http://washingtontimes.com/upi-breaking/20050402-093001-5192r.htm> (retrieved May 31, 2006); "Only Sudanese judiciary can try Darfur war crimes – al-Bashir," *Sudan Tribune*, February 19, 2006 [online], http://www.sudantribune.com/article_impr.php3?id_article=14151 (retrieved May 30, 2006); "Sudan vows not to extradite suspects of Darfur war crimes," *Xinhua News Agency*, February 19, 2006 [online], http://news.xinhuanet.com/english/2006-02/19/content_4200443.htm (retrieved May 30, 2006).

has been charged on the basis of command responsibility for these crimes, even though both the crimes and many perpetrators have been named and are well-known within Sudan and to the international community.

This paper sets out the results of an examination by Human Rights Watch into the background of the establishment of the SCCED, the legal context in which the Court operates and information on how the initial trials before the SCCED have been conducted. Human Rights Watch concludes:

- The procedure and laws to be applied by the Court are far from clear and the hybrid of Sudanese statutes, *shari'a* law, law by decree and references to international law which could be applied make the Court's work opaque and arbitrary.
- The absence of explicit definitions in Sudanese law of crimes against humanity and violations of international humanitarian law makes it less likely that these crimes will actually be prosecuted in an appropriate manner.
- No provisions exist for prosecuting leaders on the basis of command responsibility. Reliance on ordinary criminal law means that local, state or national leaders are unlikely to be held accountable for the acts of their subordinates unless direct involvement of the leaders in the crimes can be demonstrated. Prosecution of leaders is essential to enforcing accountability in Darfur.
- Broad immunity provisions in Sudan's laws create obstacles to successfully prosecuting members of the armed forces (including the Popular Defense Forces and some Janjaweed), national security agencies and police, for their role in the events.
- The high burden of proof for rape cases, as well as the threat of prosecution for adultery, makes it difficult for rape victims to bring their cases to the police.
- Sudanese law raises serious concerns about the ability of the courts to conduct trials consistent with international fair trial standards. For example, Sudanese law does not provide an absolute prohibition on admission of statements obtained as a result of torture.
- Demonstration of the lack of political will to take these cases begins at the lowest levels. Police often refuse to take complaints from victims and do not investigate cases brought to them.
- Victims or witnesses who do report crimes to the police often face indifference, harassment or possibly even arrest. Victims of sexual violence in particular are treated with disregard, if not outright hostility, by police.

Without a reversal of policy on the part of the Sudanese government and political will to punish past atrocities and prevent further crimes, the Sudanese government cannot be said to have demonstrated ability and willingness to establish accountability for the crimes in Darfur.

Part I: The SCCED

Events Leading to the Establishment of Special Criminal Court on the Events in Darfur

Since early 2003, Sudanese government forces and allied “Janjaweed”³ militias have been engaged in crimes against humanity, war crimes and “ethnic cleansing” in Darfur as the means of conducting a counter-insurgency campaign against two rebel movements, the Sudan Liberation Army/Movement (SLA/M)(which is now split into two factions) and the Justice and Equality Movement (JEM). Human Rights Watch and others have documented the widespread crimes committed by Sudanese government forces and Janjaweed, including the targeted killing, summary execution and rape of thousands of civilians, the destruction of hundreds of villages, the theft of millions of livestock and the forced displacement of more than two million people in Darfur.⁴ The rebel movements are responsible for attacks on civilians and humanitarian aid workers and

³ Janjaweed has many translations. Dr. Sharif Harir translates the term “janjawid” as “hordes” which is used to refer to the Arabs, describing the Fur-Arab conflict of 1987-89: “Arab bands called janjawid (hordes) or fursan (knights) roamed the Fur areas, burning villages, killing indiscriminately and appropriating Fur property at will. The Arab janjawid slaughtered anyone whose tribal identity was Fur in complexion or facial appearance, whether on a highway or in a village. The Fur also started developing their own groups, the malishiyat (militias) and responded in a similar way.” Harir, Sharif, “‘Arab Belt’ versus ‘African Belt,’” in Sharif Harir and Terje Tvedt, eds., *Short-Cut to Decay, The Case of the Sudan* (Nordiska Afrikanstitutet: Upsala, Sweden: 1994), p. 165.

⁴ See “Darfur in Flames: Atrocities in Western Sudan,” *A Human Rights Watch Report*, vol. 16, no. 5(A), April 2004 [online], <http://hrw.org/reports/2004/sudan0404>; “Darfur Destroyed: Ethnic Cleansing by Government and Militia Forces in Western Sudan,” *A Human Rights Watch Report*, vol. 16, no. 6(A), May 2004, [online] <http://hrw.org/reports/2004/sudan0504>; “Darfur Documents Confirm Government Policy of Militia Support,” *A Human Rights Watch Briefing Paper*, July 19, 2004 [online], <http://hrw.org/english/docs/2004/07/19/darfur9096.htm>; “Empty Promises? Continuing Abuses in Darfur, Sudan,” *A Human Rights Watch Briefing Paper*, August 11, 2004 [online], <http://hrw.org/backgrounder/africa/sudan/2004/sudan0804.pdf>; “If We Return We Will Be Killed,” *A Human Rights Watch Briefing Paper*, November 15, 2004, [online] <http://hrw.org/backgrounder/africa/darfur1104>; “Targeting the Fur: Mass Killings in Darfur,” *A Human Rights Watch Briefing Paper*, January 24, 2005 [online], <http://www.hrw.org/backgrounder/africa/darfur0105/>; “Sexual Violence and its Consequences among Displaced Persons in Darfur and Chad,” *A Human Rights Watch Briefing Paper*, April 12, 2005 [online], <http://hrw.org/backgrounder/africa/darfur0505/darfur0405.pdf>; “Entrenching Impunity: Government Responsibility for International Crimes in Darfur,” *A Human Rights Watch Report*, vol. 17, no. 17(A), December 2005 [online], <http://hrw.org/reports/2005/darfur1205>; Amnesty International, “Sudan: At the Mercy of Killers— Destruction of Villages in Darfur,” AI Index No. AFR 54/072/2004, July 2, 2004 [online], <http://web.amnesty.org/library/Index/ENGAFR540722004?open&of=ENG-SDN> (retrieved February 17, 2006).

summary executions of captured combatants that may amount to war crimes.⁵ All are guilty of repeated violations of the April 2004 ceasefire agreement.

Attacks by the government-backed Janjaweed militias have extended to villages in Chad, displacing thousands there.⁶ To date there have been no meaningful efforts to establish accountability for violations of international humanitarian law in Sudan by the Sudanese government or the rebels. Indeed, the climate of impunity fostered by the failure to prosecute has encouraged government-backed militias and its own armed forces to continue to commit abuses. This has clearly contributed to the worsening security environment in the region.⁷

The unwillingness of the Sudanese government to prosecute serious abuses reflects a broader failing to reverse “ethnic cleansing” in Darfur. Instead of disarming the militias, Khartoum has incorporated them into security, police and military forces. Instead of acknowledging state responsibility for the scale and gravity of the crimes committed in Darfur, senior Sudanese officials continue to obfuscate, deny and evade responsibility for the atrocities and scorched earth campaign against civilians in Darfur. Committees set up ostensibly to deal with these issues have produced no meaningful results.

On May 8, 2004, the Sudanese government established a national commission of inquiry by presidential decree. This national commission, which was under enormous pressure to present a view compatible with the government’s position, concluded that while there were incidents of serious abuses, there were not widespread or systematic crimes.⁸

The international community has taken initial steps to end impunity for some of these horrific crimes. The Security Council established the International Commission of

⁵ Security Council Panel of Experts on the Sudan, “Letter dated 30 January 2006 from the Chairman of the Security Council Committee established pursuant to resolution 1591 (2005) concerning the Sudan addressed to the President of the Security Council”, Annex, Report, p. 59, S/2006/65, January 30, 2006 [online], <http://daccessdds.un.org/doc/UNDOC/GEN/N05/632/74/PDF/N0563274.pdf?OpenElement> (retrieved May 30, 2006).

⁶ See e.g. “Chad: Sudanese Militia Massacre Chad Civilians,” Human Rights Watch Press Release, May 26, 2006, [online] <http://hrw.org/english/docs/2006/05/24/chad13444.htm>; “Darfur Bleeds: Recent Cross-Border Violence in Chad,” *A Human Rights Watch Briefing Paper*, February 21, 2006 [online], <http://www.hrw.org/backgrounder/africa/chad0206>.

⁷ “Darfur: Humanitarian Aid under Siege,” *A Human Rights Watch Briefing Paper*, May 8, 2006 [online], <http://hrw.org/backgrounder/africa/sudan0506/>.

⁸ United Nations, Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General (hereinafter “International Commission of Inquiry Report”), January 25, 2005, paras. 459-462 [online], http://www.un.org/News/dh/sudan/com_inq_darfur.pdf (retrieved May 30, 2006); “Sudanese inquiry Denies Darfur Genocide” Agence France Presse, January 20, 2005 [online], <http://www.abc.net.au/news/newsitems/200501/s1285951.htm> (retrieved May 30, 2006).

Inquiry on Darfur in September 2004⁹ and in January 2005, just days after the national commission's report was publicized, the International Commission submitted its 164-page report to the Security Council on widespread and grave crimes in Darfur.

The Security Council, on the basis of the findings of the International Commission of Inquiry, referred the matter of Darfur to the ICC in March 2005—the first such Security Council referral since the ICC was established on July 1, 2002.¹⁰ On June 6, 2005, the ICC Prosecutor announced his intention to open an investigation into the events that took place in Darfur.¹¹

The very next day, the Chief Justice and President of the Supreme Court in Sudan announced the creation of a Special National Criminal Court on the Events in Darfur.¹²

Framework for Prosecution of Crimes in Darfur

Sudan was governed for many years by a combination of common law and Islamic law. Islamic law was used for personal disputes between Muslims, such as matters of family law and inheritance. In 1983, however, Sudan's leader, President Jafa'ar Nimeiri, declared Sudan an Islamic state and imposed Islamic law, *shari'a*, on the entire country. This was among the reasons leading to full-fledged resumption of civil war with the non-Islamic south.¹³ *Shari'a* was refined and strengthened in criminal law by the Criminal Act of 1991 and is still the basis of law in Darfur.¹⁴

In response to a power struggle inside the ruling party, a state of emergency was declared in Sudan in 1999 and lifted throughout the country in 2005. However, it remains in place in Darfur and eastern Sudan. The state of emergency means important legal rights,

⁹ United Nations Security Council Resolution 1564 (2004), U.N. SCOR, 59th Sess., U.N. Doc. S/RES/1564 (2004), para.12 [online] <http://daccessdds.un.org/doc/UNDOC/GEN/NO4/515/47/PDF/NO451547.pdf/OpenElements> (retrieved May 30, 2006).

¹⁰ United Nations Security Council Resolution 1593 (2005), U.N. SCOR, 60th Sess., U.N. Doc. S/RES/1593 (2005) [online], <http://www.icc-cpi.int/library/cases/N0529273.darfureferral.eng.pdf>.

¹¹ "The Prosecutor of the ICC Opens Investigation in Darfur," ICC Press Release, The Hague, June 6, 2005 [online], <http://www.icc-cpi.int/press/pressreleases/107.html> (retrieved May 30, 2006).

¹² See Annex to the letter dated 18 June 2005 from the Chargé d'affaires a.i. of the Permanent Mission of the Sudan to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2005/403; Decree Establishing the Special Criminal Court on the Events in Darfur, June 7, 2005.

¹³ Kent Benedict Gravelle, "Islamic Law in Sudan: A Comparative Analysis," 5 ILSA J. Int'l & Comp. L. p. 3, 4 (Fall, 1998).

¹⁴ In 1991, *shari'a* was applicable to all of Sudan with the exception of the southern region. Under the Interim National Constitution of July 2005, following the January 2005 Comprehensive Peace Agreement with the southern rebels, *shari'a* is applicable to all of Sudan with exception of the southern autonomous region.

such as due process guarantees and freedom of assembly, are suspended and the president has extraordinary powers to rule by decree. The parallel use of laws and emergency decrees to govern Sudan makes it difficult to analyze the Sudanese legal system in an accurate manner. This is in part due to the difficulty in determining what laws have been promulgated in Northern and Southern Sudan and “where and when, if at all, they are effective.”¹⁵

The basic structure of the judicial system is set forth in the Interim National Constitution which is to last until 2011. The Interim Constitution, which was passed by the National Assembly on July 6, 2005 as part of the January 2005 Comprehensive Peace Agreement between the government and the southern-based rebels, provides for an independent Constitutional Court consisting of nine justices. Its duties include interpreting constitutional provisions at the request of the government, deciding disputes arising under the constitution, adjudicating the constitutionality of laws, and protecting “human rights and fundamental freedoms.” It has criminal jurisdiction over the President of the Republic, the vice presidents, the speakers of the National Legislature, the Justices of the National Supreme Court and the Southern Sudan Supreme Court.¹⁶ The Interim Constitution also defines the national judiciary as consisting of the National Supreme Court, the National Courts of Appeal and other national courts. The National Supreme Court is the court of final review for cases arising under national law including all criminal cases in which the death penalty has been imposed. The number, competencies and procedures of National Courts of Appeal are not set out in the Interim Constitution.¹⁷

The Judiciary Act of 1986 sets forth the arrangement of the lower courts which still exists in some form today. Sudan is divided into 26 states or *wilayat* and subdivided into 133 districts. Every state has a “judicial organ” consisting of a court of appeal based in the state capital, general courts and district courts. The courts with primary jurisdiction

¹⁵ T. Reynolds & A. Flores, *Foreign Law: Current Sources of Codes and Basic Legislation in Jurisdictions of the World* (Littleton, CO: Rothman, 1989-), III Sudan 4 (6/2005 Release). Some experts have said any description of the Sudanese legal system or body of legislation would be “futile and presumptuous.” *Ibid.*

¹⁶ Interim National Constitution of the Republic of Sudan, *Republic of the Sudan Gazette*, Special Supplement No. 1722, July 10, 2005, Articles 119-122.

¹⁷ *Ibid.*, Articles, 123-128. A National Judicial Service Commission Act, adopted by the National Assembly in October 2005 and endorsed by the President in November, is not consistent with the Interim National Constitution or the Interim Constitution of Southern Sudan as it incorrectly provides for the President to appoint all judges throughout Sudan. The Sudan People’s Liberation Movement/Army (SPLM) has announced it may challenge the Act in the Constitutional Court. The National Constitutional Review Commission (NCRC), intended under the CPA to assure that legislation is consistent with the CPA and the Interim National Constitution, was dissolved and then re-established in January 2006 but has not met since then. United Nations Mission in Sudan, *The CPA Monitor*, March 2006, pages 4, 7, 8 [online], http://www.unmis.org/common/documents/cpa-monitor/cpaMonitor_mar06.pdf (retrieved May 31, 2006).

over criminal matters are the district courts. There are three levels of district courts and their jurisdiction is defined in the 1991 Criminal Procedure Act. The highest level, the First Criminal Court, may impose the death penalty or any other sanction provided by law. The Second Criminal Court may impose a sentence of imprisonment for a term not exceeding seven years and whipping or fines, and the Third Criminal Court may impose a sentence of imprisonment for a term of no more than four months and a maximum of forty lashes. The courts' authority to impose sentences is more limited when the proceedings are held summarily.¹⁸

In addition to the regular criminal courts, the 1997 Emergency and Public Safety Act and the Judiciary Act allow the Chief Justice to establish special criminal trial and appeals courts.¹⁹ In the five years since a state of emergency was declared in Darfur in 2001, three separate sets of special courts have been established under the state of emergency provisions. The Sudanese government first established special courts in 2001. The original special courts were headed by one civilian judge sitting with a member of the military and a member of the police. In 2003, these special courts were replaced by *specialized* courts, headed by a civilian judge only.²⁰ The *specialized* courts, like the special courts they replaced, have jurisdiction over crimes of particular interest to the state.²¹ These include offenses against the state (such as espionage), robbery, banditry, killing, unlicensed possession of firearms and "anything else considered a crime by the Wali (governor) or head of state or head of the judiciary."²² Judges who sit on the *specialized* courts are frequently lay people with no legal training or recruited from the military.²³ Observers report inconsistent application of criminal law and criminal procedure law across the criminal court system in Darfur.²⁴ There is also no clear delineation of the functions of the *specialized* courts and the new Special Criminal Court on the Events in Darfur which exist concurrently. They both have jurisdiction over the same crimes and it is unclear how it is decided which cases are assigned to which court. As discussed below, the *specialized* courts have prosecuted crimes relating to the conflict while the

¹⁸ Criminal Procedure Act, 1991, Articles 10-12.

¹⁹ Emergency and Public Safety Protection Act, 1997, Act No. 1, 1998, Article 6(2); Judiciary Act, Article 10(1)(e).

²⁰ See International Commission of Inquiry Report, paras. 441-444.

²¹ See e.g., Amnesty International, "Sudan: No one to complain to: No respite for the victims, impunity for the perpetrators," A.I. Index No. AFR 54/138/2004, December 2, 2004, p. 35-36, [online], <http://web.amnesty.org/library/index/engaf541382004> (retrieved May 30, 2006).

²² Decree 21/2001 of the State Governor on the establishment of a Special Criminal Court at El-Fashir, Article 4, May 1, 2001.

²³ Hamouda Fathelrahman Bella, "Shari'a in Sudan", in *Radical Islam's Rules: The Worldwide Spread of Extreme Shari'a Law*, Paul Marshall, ed., (Rowman & Littlefield Publishers, Inc, 2005), p. 104.

²⁴ Reports from legal observers on file with Human Rights Watch.

SCCED has prosecuted ordinary crimes unrelated to the events at issue.²⁵ After the establishment of the new Special Criminal Court on the Events in Darfur, cases were reportedly withdrawn from the existing *specialized* courts without explanation or notice, including in many cases without proper notification to defense attorneys.²⁶

The Legal Basis for the SCCED

On June 7, 2005, the Chief Justice and President of the Supreme Court in Sudan established by decree the Special Criminal Court on the Events in Darfur. The objective behind the creation of the court is clear. When Sudanese authorities established the SCCED, they stated that it was “considered a substitute to the International Criminal Court.”²⁷ A Ministry of Justice statement challenging the ICC’s jurisdiction made explicit reference to Article 17 of the Rome Statute which allows the chambers of the ICC to determine a case is inadmissible “if the State which has jurisdiction is investigating or prosecuting the case unless the State is unwilling or unable genuinely to carry out the investigation or prosecution.”²⁸ Both President Omar El Bashir and former Foreign Minister Mustafa Osman Ismail (replaced in September 2005 by Lam Akol Ajawin, who was appointed by the Sudan People’s Liberation Movement under the CPA) have stated that they will refuse to extradite Sudanese nationals to be tried abroad, and that Sudan’s judiciary has sole jurisdiction over crimes in Darfur.²⁹

The new Special Criminal Court was originally established as a single court which would be seated in Fashir, the capital of North Darfur, and travel throughout Darfur. The decree establishing this court gave it jurisdiction over the following:

²⁵ United Nations High Commissioner for Human Rights, “Second Periodic Report of the United Nations High Commissioner for Human Rights on the Human Rights Situation in Sudan,” January 2006, p. 30 [online], http://www.ohchr.org/english/countries/docs/sudanjanuary06_En.pdf (retrieved May 30, 2006).

²⁶ Sudanese Organisation Against Torture (hereinafter “SOAT”), Annual Report on the Human Rights Situation in Sudan, March 2005-March 2006, April 12, 2006, p. 35 [online], <http://www.soatsudan.org/reports/SOAT%20Annual%20Report%20on%20the%20Human%20Rights%20Situation%20in%20Sudan%202005-2006%20-%2012%20April%202006.pdf> (retrieved May 30, 2006).

²⁷ “Sudan: Judiciary challenges ICC over Darfur cases,” IRIN, June 24, 2005, at http://www.irinnews.org/report.asp?ReportID=47802&SelectRegion=East_Africa&SelectCountry=SUDAN (retrieved May 30, 2006).

²⁸ *Ibid.*

²⁹ “Sudan rejects handing over Darfur suspects,” UPI, April 2, 2005 [online] <http://washingtontimes.com/upi-breaking/20050402-093001-5192r.htm> (retrieved May 31, 2006); “Only Sudanese judiciary can try Darfur war crimes – al-Bashir,” *Sudan Tribune*, February 19, 2006 [online], http://www.sudantribune.com/article_impr.php3?id_article=14151 (retrieved May 30, 2006); “Sudan vows not to extradite suspects of Darfur war crimes,” *Xinhua News Agency*, February 19, 2006 [online], http://news.xinhuanet.com/english/2006-02/19/content_4200443.htm (retrieved May 30, 2006).

- (a) Acts which constitute crimes in accordance with the Sudanese Penal Code and other penal codes;
- (b) Any charges submitted to it by the Committee established pursuant to the decision of the Minister of Justice No. 3/2005 of 19 January 2005 concerning investigations into the violations cited in the report of the [Sudanese government's] Commission of Inquiry;
- (c) Any charges pursuant to any other law, as determined by the Chief Justice.³⁰

New amended decrees issued in November and December 2005 broadened the Special Court's jurisdiction to include "international humanitarian law" and established three permanent seats for the court in Nyala, Fashir and Geneina, the capitals respectively of South Darfur, North Darfur and West Darfur.³¹

The decrees set forth some court procedures, but make it clear that the SCCED is obligated to follow the 1991 Criminal Procedures Act and the 1994 Evidence Act.³²

In addition to these courts, on September 18, 2005 a Specialized Prosecution for Crimes against Humanity Office was established in Khartoum by a decree from the Acting Minister of Justice.³³ The Specialized Prosecution is tasked with "exercising the powers provided for in the Criminal Procedures Act, 1991, the international humanitarian law, the international conventions to which the Sudan is party and any other relevant law in relation to crimes against humanity and any other crimes stated in any other law and which infringes upon (constitutes a threat to) the security and safety of humanity."³⁴ Its jurisdiction covers all of Sudan and it is based in Khartoum. It has reportedly provided some assistance to state prosecutors in Darfur in recent cases.

³⁰ Decree Establishing the Special Criminal Court on the Events in Darfur, June 7, 2005, article 5, reprinted in U.N. Doc.S/2005/403.

³¹ Amendment of the Order of Establishment of Criminal Court for Darfur's Incidents, November 10, 2005.

³² *Id.*, Article 19.

³³ Decree on the Establishment of a Specialized Prosecution for Crimes against Humanity, September 18, 2005.

³⁴ *Ibid.*, Article 3.

The SCCED in Action: Judging Ordinary Crimes, Not Crimes against Humanity

When first established, the Sudanese authorities announced that 160 accused were to be tried before the SCCED.³⁵ The identity of these 160 people is still unclear. A year later, the reality has fallen far short of the pronouncement as only a small number of people have been brought before the SCCED. Human Rights Watch has been able to collect information on a total of thirteen cases that have been brought before the SCCED to the date of writing this report. The details of these cases are summarized below. Only the “Tama case” (so-called as it relates to an October 23, 2005 attack on civilians in the village of Tama) brought before the Nyala SCCED is related to a large-scale attack against civilians, and even in this case the three defendants were charged, and ultimately convicted, with acts of theft that took place the day after the attack on the civilians and not for any role in the actual attack or killings that had occurred. Two other cases involved prosecutions for murder by Military Intelligence (MI) officials for deaths while in custody due to torture in Darfur. The other cases before the SCCED involve mostly ordinary criminal matters—in the larger context of the Darfur conflict—such as individual acts of armed robbery, weapon possession and murder that could have been prosecuted by the ordinary courts. In one case, the SCCED prosecuted three civilians and three low-ranking military soldiers for the theft and slaughter of a herd of sheep, an event unrelated to the extensive attacks and widespread killings that engulfed Darfur in 2003 and 2004 and which continue to this day.

As mentioned above, the ordinary criminal courts in Darfur are prosecuting cases which are indistinguishable from those prosecuted before the SCCED. For example, at the same time the SCCED in Geneina was prosecuting a Central Police reservist for the shooting of an unarmed student (see below), the regular Geneina criminal court was prosecuting a Central Police reservist for the rape of a ten-year-old girl in Mornei’s displaced persons camp in August 2005, as well as another Central Police reservist for the murder of a civilian. Both courts are prosecuting ordinary crimes that happened to occur during the war rather than violations of international humanitarian law or crimes against humanity.

While it could be argued that the relatively minor nature of the initial cases before the SCCED could have been expected when the SCCED was first established because it was a new court, recent cases brought before the Court do not indicate a trend towards addressing the more serious crimes committed during the conflict in Darfur. Six of the thirteen cases on which Human Rights Watch was able to collect information (including

³⁵ Mark Oliver, “Sudan Rejects ICC Extradition Calls,” *Guardian*, June 29, 2005 [online] <http://www.globalpolicy.org/intljustice/icc/2005/0629reject.htm> (retrieved May 30, 2006).

the two listed below) were opened in 2006 by the Geneina SCCED. Of these, four involved individual murders committed by civilians, a fifth involved the prosecution of a political activist for supporting rebel groups in Darfur and a sixth involved the prosecution of a Central Police reservist for the killing of an unarmed student protester. The Tama case before the Nyala SCCED referred to above related to the October 2005 attack on Tama village in South Darfur that resulted in the deaths of twenty-eight civilians. However, the two low-ranking members of the Border Military Intelligence service and the civilian who were ultimately prosecuted were charged with looting after the attack and not for any role in the attack itself or any of the killings.

In December 2005, the Minister of Justice, Mohamed Ali al-Maradi, publicly announced that investigations were complete with respect to the January 2005 joint Sudan Armed Forces and Janjaweed militia attack on Hamada, South Darfur, which led to the deaths of more than eighty civilians, and that court proceedings would begin the following week.³⁶ However, at the time of the writing of this report, these hearings have not commenced. A Sudanese government official reported to U.N. Mission in Sudan Human Rights staff that investigations had not gone forward because the governor of South Darfur is preventing the prosecution from proceeding because he favors “reconciliation” between the tribes.³⁷ Furthermore, the Minister of Justice made it clear that no officials had been investigated in these attacks and that the role of government planes in the bombing of the village would not be addressed when the case went to court.³⁸

Nine cases have been concluded or are in the process of being heard by the SCCED so far, and another four cases have been referred to the SCCED (all of them in Geneina) but have not yet been heard by the court. While the practice so far in the SCCEDs has varied, there have been reports that most of the initial trials were held in a single day, often in the absence of witnesses and defense lawyers.³⁹ The following details are known about the cases that have been heard by the SCCED so far:⁴⁰

³⁶ Opheera McDoom, “Sudan bars global court investigators from Darfur” Reuters, December 14, 2005; “Sudan Minister Says Darfur Criminal Courts to Hear Cases ‘Next Week’”, Financial Times Information, December 11, 2005.

³⁷ Office of the High Commissioner for Human Rights (OHCHR), “Third Periodic Report of the United Nations High Commission for Human Rights on the human rights situation in the Sudan,” para. 55 [online], <http://www.ohchr.org/english/countries/sd/docs/3rdOHCHRApril06.pdf> (retrieved May 23, 2006).

³⁸ Opheera McDoom, “Sudan bars global court investigators from Darfur,” Reuters, December 14, 2005.

³⁹ SOAT, Annual Report on the Human Rights Situation in Sudan, March 2005-March 2006, April 12, 2006, p. 35.

⁴⁰ The information on the cases below was collected by Human Rights Watch from a variety of Sudanese and international sources. Human Rights Watch cannot identify the precise source of its information because this could endanger contacts and put them at risk of persecution and arrest. All information cited in this section is on file with Human Rights Watch.

1) On June 18, 2005, the SCCED sitting in Nyala began the prosecution of two soldiers and eight members of the Popular Defense Forces (PDF) for rape and armed robbery.⁴¹ The case involved a December 20, 2004 incident in which an estimated fifteen attackers robbed a bus traveling from Nyala to Fashir and raped a female prisoner who was on the bus. She was in police custody for transfer to the Fashir Juvenile detention center. The accused were arrested by an army patrol immediately after the incident. On August 27, 2005, all ten defendants were acquitted of all charges by the SCCED.

2) On June 23, 2005, the SCCED sitting in Nyala began the prosecution of four members of the Ma'alia ethnic group, including an eleven-year-old boy and a seventy-two-year-old man, for the armed robbery of a transport vehicle near the South Darfur town of Gereida. On July 25, 2005, the SCCED found the three adult defendants guilty of armed robbery, and imposed custodial sentences ranging from five to seven years. The eleven-year-old minor was also found guilty of armed robbery, and sentenced to a rehabilitation school for three years.

3) On June 25, 2005, the SCCED sitting in Nyala began the prosecution of a male defendant for armed robbery, intentional wounding and illegal possession of weapons charges. The case involved the March 22, 2005 shooting at a four-car humanitarian convoy which gravely wounded an official of the United States Agency for International Development (USAID). The defendant was detained soon after the shooting by Sudanese police and Popular Defense Forces, who found him in the area of the incident with an AK-47 weapon. On August 28, 2005, the accused was convicted for possession of illegal weapons, but acquitted on the charges of armed robbery and intentional wounding.

4) On July 3, 2005, the SCCED sitting in Fashir began the prosecution of three civilians and three low-ranking military soldiers for the theft and slaughter of fifty-one sheep. The men were charged with armed robbery and one of the civilian defendants, a butcher, was also charged with receiving stolen goods. On August 13, 2005, the SCCED found the butcher guilty of receiving stolen goods, and also convicted the three soldiers of armed robbery. The two other civilians were acquitted.

5) On July 5, 2005, the SCCED sitting in Fashir began the prosecution of two Military Intelligence officers for the March 11, 2005 murder of a young boy who was tortured to

⁴¹ As discussed further below, the PDF is an Islamist militia created in 1989 as a paramilitary force. It was established to assist the armed forces with the "jihadist" war in Southern Sudan and the Nuba mountains.

death while in custody.⁴² The deceased and two relatives, all young Zaghawa boys (the Zaghawa is one of the ethnic groups targeted by the Sudanese government in Darfur), were detained by Military Intelligence in Kutum, North Darfur, in March 2005. The deceased died while in the custody of Military Intelligence soon after being detained. The two Military Intelligence defendants were arrested on April 4, 2005, and charged with murder (Article 130) and causing intentional injuries (Article 139). On August 15, the SCCED convicted the two Military Intelligence officers of murder.

6) On August 9, 2005, the SCCED sitting in Fashir began the prosecution of four members of Military Intelligence for the March 2005 death while in custody of a sixty-year-old rebel suspect at the Kutum military camp. The elderly suspect was detained by Military Intelligence on suspicion of collaborating with the rebels and died from injuries sustained from torture on the same day as his arrest. One of the four accused, a Military Intelligence officer, escaped from custody during the trial. On November 16, 2005, the SCCED convicted two Military Intelligence privates (the lowest rank in Military Intelligence) of murder, and sentenced them to death. The third accused, the Chief of Military Intelligence at Kutum military base—the only command-level officer to be charged by the SCCED to date—was acquitted of the charges.

7) In February 2006, the Geneina SCCED began the prosecution of a Central Police reservist for the shooting of an unarmed student on December 21, 2005. The defendant was accused of opening fire on a crowd of students who wanted to demonstrate to protest an attack on a nearby village by Arab militia.⁴³ The Central Police reservist was discharged following the incident, and was prosecuted as a civilian for murder (Article 130). In late March 2006, after several days of hearings in February and March, the Central Police reservist was found guilty and sentenced to death.

8) On February 15, 2006, the Nyala SCCED began the only hearings so far in a case involving a large-scale attack on civilians. The case was set against the background of the October 23, 2005 attack by Janjaweed militias on the village of Tama,⁴⁴ approximately 25 kilometers north of Nyala, which resulted in the deaths of twenty-eight

⁴² At the trial there was controversy over the actual age of the deceased victim, with age estimates ranging from thirteen to seventeen. Relatives at the trial stated that the age of the deceased was seventeen or eighteen, but a police official at the trial claimed the deceased's age was twenty-four.

⁴³ Opheera McDoom, "Sudan Policeman in Court over Darfur Violence," Reuters, February 8, 2006 [online], http://www.redorbit.com/news/international/384232/sudan_policeman_in_court_over_darfur_violence/index.html [retrieved May 30, 2006].

⁴⁴ Tama is also the name of an ethnic group present in Darfur and Chad. Tama village, in South Darfur, was inhabited by people of the Fur ethnicity.

civilians.⁴⁵ Charges were brought against two low-ranking members of the Border Military Intelligence service and a civilian who were arrested by Sudanese police officials while allegedly looting Tama village on October 26, 2005. No allegations have been made that the defendants were involved with the killings of civilians in the village. On March 20, 2006, the men were charged before the SCCED for looting, under Article 21 of the 1991 Criminal Code (criminal conspiracy) and also Article 8(b)(16) of the Rome Statute of the International Criminal Court (“Pillaging a town or place, even when taken by assault.”). On May 3, 2006, the SCCED acquitted the men of the robbery charges and Rome Statute charges related to the attack of October 23, 2005, due to the absence of evidence that the men were actually present during the attack. The Court did find the men guilty under the Sudanese criminal code for the theft of property of the villagers of Tama. The Court imposed sentences of three years on the two members of Border Military Intelligence and two years on the civilian defendant. The extra year imposed on the members of the Border Military Intelligence was allegedly to reflect the aggravating factor that the men had been responsible for protecting the villagers.

9) On March 22 and 23, 2006, the Geneina SCCED began the prosecution of a forty-three-year-old member of the opposition Sudan Federal Democratic Alliance, Sharif Abakir Ismail, for undermining Sudan’s constitutional system (Article 50 of 1991 Criminal Act); waging war against the State (Article 51); Sedition (Article 63); and membership in a criminal or terrorist organization (Article 65). The defendant was arrested in late October 2005 at a police checkpoint, and had been held in Military Intelligence custody for two months prior to being transferred to police custody. Allegations have been made that the defendant was tortured in Military Intelligence custody. The case has been adjourned until May 2006, in order to allow the SCCED time to clarify the status of the Sudan Federal Democratic Alliance within the current Government of National Unity.

The Geneina General Court has also referred another four cases to the Geneina SCCED, all of them of civilians accused of single cases of murder of other civilians. At the time of the publication of this report the four cases have yet to proceed to trial, so the exact nature of the charges remains uncertain. However, none of the four cases involves large-scale killings and none of the defendants in the cases are security officials.

In short, the cases brought before the SCCED to date have not begun to address issues of accountability in the region. The cases have dealt with individual abuses, which are marginally related to the serious and widespread violations committed in Darfur and

⁴⁵ See United Nations Security Council, Monthly Report of the Secretary-General on Darfur, April 5, 2006, U.N. Doc. S/2006/218, para. 17.

have failed to seek to bring to justice those most responsible for these extensive violations. This is the result of a lack of political will, which is reflected both in the cases chosen and in the laws governing the courts.

Part II: The Obstacles

Legal Framework

The International Commission of Inquiry found in its report of January 25, 2005 that the Sudanese legal system had serious flaws which made it incapable of acting to address the abuses in Darfur.⁴⁶ The new Special Criminal Court on the Events in Darfur does not address these flaws. As discussed above, because of the use of decrees under the State of Emergency, it is difficult to know exactly what laws are being applied by the courts. At any given point, the Chief Justice or a state governor under emergency powers could issue a new decree establishing different procedures for prosecution without legislative or other participation. This adds to the general lack of transparency surrounding the Sudanese legal system. What follows is an assessment of the laws available at the time of this writing.

Lack of proscription in the substantive law

The attacks and destruction that occurred in Darfur from 2003 to the present are properly categorized as violations of international humanitarian law and crimes against humanity. However, crimes against humanity, genocide and war crimes are not included in the Sudanese Criminal Act of 1991 or in any of the statutes governing the military. The absence of an explicit statutory basis which sets out the elements of the crimes in domestic statutes creates a potential barrier from the outset as to the likelihood that these crimes will actually be prosecuted in an appropriate manner.

Although crimes such as rape and murder, which are components of war crimes and crimes against humanity, are prohibited under Sudanese law, the prosecution of individual ordinary crimes does not adequately take into account the context in which the crimes occur, the fact that the crimes are committed as part of the prosecution of a conflict and that they may form part of a larger more organized campaign involving violations of civilians' rights. In addition, ordinary criminal liability does not attribute responsibility to military leaders for the acts of those under their control unless there is proof that the leader ordered the subordinate to commit a crime. The inability to prosecute for command responsibility is discussed further below.

⁴⁶International Commission of Inquiry Report, para. 450.

In November 2005, the Chief Justice attempted to rectify this lack of proscription by amending the Special Court decree to extend the jurisdiction of the court to state that the court can also apply “international humanitarian law.”⁴⁷ This raises the theoretical possibility that the SCCED does have the capacity to prosecute crimes over which the ICC has jurisdiction. However, whether this is a legal reality is far from certain. In the recent court ruling in the Tama case the defendants did face charges of looting as set out in the Rome Statute establishing the International Criminal Court. The SCCED noted that Article 5(A) of the Order of the Establishment of Nyala Criminal Court for Darfur’s Incidents set the Court’s jurisdiction as: “Actions which constitute crimes pursuant to the Sudanese Criminal Act, other penal laws and the international humanitarian law.” In this case, however, the evidence did not support the initial charges brought under the Rome Statute. Aside from this single charge, all of the cases in the Special Criminal Court’s first year of operations have relied on crimes under the 1991 Criminal Act and have not sought to rely on “international humanitarian law.”

Prosecuting on the basis of command responsibility

The scale of atrocities committed in Darfur requires the full range of those most responsible for war crimes and crimes against humanity be prosecuted as well as the frontline soldiers who carried out the crimes. To do this, prosecutions must be based not only on criminal liability for direct perpetration but also on command responsibility. Command responsibility is applicable to military commanders or other superiors who “knew or should have known” that subordinates were committing or about to commit such crimes and either “failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation or prosecution.”⁴⁸ This basis of liability is essential for prosecuting commanders who in many cases will not have been the direct perpetrators and in some cases will not even have been present at the scene of the crime. However, it is the commanders who are leading the conflict who bear responsibility for the crimes committed by those under their command. Reliance on charges based on regular criminal law in Darfur does not allow for development of a theory of command responsibility that would hold accountable local, state or national leaders who participated in the planning and/or sanctioning of crimes.

As mentioned above, in a statement announcing the establishment of the Court, Chief Justice Jalal el-Din Mohammed Osman affirmed “that the Sudanese judiciary, as always, is capable and desirous of fully shouldering its responsibility in earnest for doing justice

⁴⁷ Amendment of the Order of Establishment of Criminal Court for Darfur’s Incidents, November 10, 2005.

⁴⁸ See e.g. Rome Statute of the International Criminal Court (hereinafter “Rome Statute”), July 17, 1998, Article 28(a), 2187 U.N.T.S. 90, U.N. Doc. A/CONF.183/9. Sudan has signed, but not ratified, the Rome Statute.

and restoring rights to their owners, free of any partiality, fear or influence, so that no person who has committed an offence may escape punishment, whatever his position or rank.”⁴⁹ However, this cannot happen where there is no basis in Sudanese law for holding superiors responsible for what their subordinates have done.

The lack of prosecution on the basis of command responsibility has been remarked upon by officials examining whether Sudan is taking steps to bring to justice those who have committed serious violations in Darfur. On February 26, 2006, Sudan reportedly gave a U.N. envoy, Sima Simar, a list of individuals who have been tried for crimes in connection with the Darfur conflict as part of its continuing effort to persuade the U.N. that Sudan is taking steps to handle the alleged crimes through its national judicial system and thus avoid ICC investigations.⁵⁰ According to the U.N. official, the list contained only the names of 15 officers from the police and army who had been tried for crimes between 1991 and 2003.⁵¹ She further stated that the special criminal courts in Darfur had not prosecuted anyone bearing command responsibility and that impunity continued to reign in Darfur.⁵² Following her visit to Sudan from April 30 to May 5, 2006, the U.N. High Commissioner for Human Rights, Louise Arbour, also stated that “Despite a number of measures taken by the authorities, notably the establishment of special courts and committees, impunity remains the norm in most cases of human rights violations in Darfur.” She described Sudanese efforts at establishing accountability as “inadequate.”⁵³

Scope of immunities

Not only does Sudanese law lack a provision allowing for prosecution on the basis of command responsibility but Sudan has enacted many immunity provisions which impede the prosecution of those in the military, police and security agencies responsible for the crimes in Darfur.

⁴⁹ Annex to the letter dated 18 June 2005 from the Chargé d'affaires a.i. of the Permanent Mission of the Sudan to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2005/403.

⁵⁰ “Sudan hands UN Darfur suspects list,” *Sudan Tribune*, February 27, 2006 [online], http://www.sudantribune.com/article.php3?id_article=14276 (retrieved May 30, 2006).

⁵¹ “Sudan unable to try Darfur suspects – UN official,” Reuters, March 6, 2006 [online], http://www.sudantribune.com/article.php3?id_article=14380 (retrieved May 30, 2006).

⁵² *Ibid.*; Noel King, “UN Envoy Urges Darfur War Crimes Prosecution,” *Voice of America News*, March 6, 2006 [online], <http://www.voanews.com/english/2006-03-06-voa24.cfm> (retrieved May 30, 2006); “Sudan accused of blocking peace efforts in Darfur,” Mail & Guardian Online, March 7, 2006 [online], http://www.mg.co.za/articlePage.aspx?articleid=266026&area=/breaking_news/breaking_news__africa/ (retrieved May 30, 2006).

⁵³ Statement by UN High Commissioner for Human Rights Louise Arbour Following her Visit to Sudan from 30 April-5 May 2006, May 8, 2006 [online] <http://www.hrea.org/lists/hr-headlines/markup/msg02828.html> (retrieved May 30, 2006).

Immunity for members of national security forces was enshrined in the National Security Forces Act of 1999. Article 33 of that Act states: “no civil or criminal proceedings shall be instituted against a member, or collaborator, for any act connected with the official work of the member, save upon approval of the Director. . . .” Similar language can be found in other acts and decrees regulating government actors. Article 46 of the 1999 Police Forces Act states: “no criminal procedure will be taken against any police officer for a crime committed while executing his official duty or as a consequence of those official duties without permission of the Minister of the Interior.”

A 1995 criminal decree setting forth requirements for bringing charges against members of the armed forces in criminal courts specifies that criminal courts have no authority to pursue charges without approval by the armed forces or a decree from the Chief Justice.⁵⁴ A temporary decree issued by the President on August 4, 2005 attempted to extend the immunity of the armed forces by amending the People’s Armed Forces Act with the following provision:

There shall not be taken any procedures against any officer, ranker [sic] or soldier who committed an act that may constitute a crime done during or for the reason of the execution of his duties or any lawful order made to him in this capacity and he shall not be tried except by the permission of the General Commander or whoever authorized by him.⁵⁵

This decree further protected the armed forces, including the PDF militia and Janjaweed, from prosecution without government consent.⁵⁶ The PDF is a paramilitary force that was established to assist the armed forces and was often used to mobilize recruits or “jihadists” to fight in the civil war (1983-2005) against the predominantly non-Muslim southern rebels.⁵⁷ This decree is currently being challenged within Parliament by former rebels, the Sudan People’s Liberation Movement.⁵⁸

⁵⁴ Criminal Decree No. 3/95, “Trial of Accused who are Subject to People’s Armed Forces Act, 1986,” October 19, 1995, Ref. T.O./General/1-1.

⁵⁵ Temporary Decree, People’s Armed Forces Act 1986, Amendment 2005, “Seeking Permission to Institute Criminal Procedures Against Any Officer, Ranker or Soldier,” August 4, 2005.

⁵⁶ The Popular Defense Forces are incorporated into the army through the Popular Defense Forces Bill which places the forces under the command of the People’s Armed Forces and the Minister of Defense. Popular Defense Forces Law (1989), Articles 6, 7, 8. The PDF militia, locally organized or organized according to school or workplace, was created as an Islamist militia. The unofficial government backing of certain tribal militia was formalized in 1989.

⁵⁷ Human Rights Watch/Africa, *Behind the Red Line: Political Repression in Sudan* (New York: Human Rights Watch, 1996), p. 274-79. In response to international concerns about Janjaweed, the Sudanese government further incorporated these militias into its PDF, police and an array of other armed units, such as the Border Intelligence Service. See e.g. “Entrenching Impunity,” *A Human Rights Watch Report*, p. 65-66; Interview with

Aside from the immunity provisions, the Criminal Act provides another possible means for members of the military to avoid accountability. The 1991 Criminal Act creates a defense of “performance of duty or exercise of right.” On the face of the law, Article 11 appears to provide a defense of following lawful orders for those who commit offenses. Article 11 states that “No act shall be deemed an offence if done by a person who is bound, or authorized to do it by law, or by a legal order issued from a competent authority, or who believes in good faith that he is bound or authorized so to do.” This provision on its face appears to be inconsistent with standards of international law which state that superior orders are not a defense to crimes against humanity and genocide.⁵⁹ While it is open to a court to deem that an order to commit a crime could not have been lawful or that the person could not have believed in good faith that it was lawful, whether or not this Article could be successfully invoked as a defense by perpetrators of war crimes remains to be seen.

Legal impediments for prosecution of rape

Widespread rape and other serious forms of gender-based violence were committed against women and girls as part of the attacks by Janjaweed and uniformed government forces on villages in all three states of Darfur. Gang rapes occurred, sometimes in public and accompanied by other forms of severe violence such as whipping, during the attacks on villages. The International Commission found a pattern of women and girls being abducted, held in confinement and raped over a period of days. Rape and other sexual violence occurred during flight and continue to occur during attacks and when women leave camps for the internally displaced.⁶⁰

The government response to the international outcry about sexual violence in Darfur took several forms. In July 2004, it established National Judicial Committees to investigate allegations of rape in Darfur and then it subsequently established a State Committee on Combating Gender-Based Violence in Southern Darfur on March 6, 2005. The mandate of the Judicial Committees was limited to rape and did not address

President El-Bashir, August 31, 2004 [online], <http://edition.cnn.com/2004/WORLD/africa/08/31/amanpour.bashir/index.html> (retrieved February 17, 2006); International Commission of Inquiry Report, paras. 117-126.

⁵⁸ The SPLM are currently a partner in the government of National Unity created pursuant to the 2005 peace agreement.

⁵⁹ See Rome Statute, Article 33.

⁶⁰ International Commission of Inquiry Report, paras. 333-353. See also “Sexual Violence and its Consequences among Displaced Persons in Darfur and Chad,”

A Human Rights Watch Briefing Paper, April 12, 2005 [online], <http://hrw.org/backgrounders/africa/darfur0505/>; “Third Periodic Report of the United Nations High Commission for Human Rights on the human rights situation in the Sudan,” at paras. 44, 58, 59, 67.

other forms of sexual abuse and violence against women. In addition they had few resources and no guidelines for conducting their work.⁶¹ The Committees met only for three weeks and their work led to only a handful of arrests.⁶² The State Committee on Combating Gender Violence, which has a broader mandate to improve the performance of the government with respect to establishing accountability for sexual violence and support for survivors, has recently released a plan of action. However there are no indications yet that its work has had a practical impact on the reported levels of sexual violence.⁶³

A number of issues call into question the Sudanese government's ability and willingness to prosecute the sexual violence crimes in Darfur. Despite the numerous consistent reports documenting patterns of rape,⁶⁴ the government has yet to prosecute any perpetrators for these crimes. Rapes of girls and women who leave camps for internally displaced persons to collect firewood continue and are regularly reported by non-governmental organizations, yet no effort has been made to bring perpetrators, often armed militia, to justice.⁶⁵ Only one rape case has been brought before the SCCED, and in that case the initial conviction was overturned on grounds that the defendants, members of the military, were entitled to immunity.⁶⁶ Although the Sudanese Armed Forces later withdrew the immunity from the defendants, opening the way for a retrial, the men were ultimately acquitted.

Major legal obstacles, in addition to the immunity provisions discussed above which protect many suspected perpetrators, continue to make victims reluctant to bring their cases to the police. If the SCCEDs rely on the domestic definition of the act of rape and the attendant requirements of proof, it will be extremely difficult for cases to be

⁶¹ International Commission of Inquiry Report, paras. 465-487.

⁶² See "If We Return We Will Be Killed," *A Human Rights Watch Briefing Paper*, p. 22-23; International Commission of Inquiry Report, paras. 466-487.

⁶³ OHCHR, "Access to Justice for Victims of Sexual Violence: Report of the United Nations High Commissioner for Human Rights," July 29, 2005, para. 67 (hereinafter "Access to Justice for Victims of Sexual Violence"), [online], http://www.ohchr.org/english/countries/docs/darfur29july05_En.pdf (retrieved May 30, 2006); OHCHR, "Second Periodic Report of the United Nations High Commissioner for Human Rights on the Human Rights Situation in Sudan," January 2006, p. 13.

⁶⁴ See "Darfur in Flames," *A Human Rights Watch Report*, p. 29-30; "Sexual Violence and its Consequences among Displaced Persons in Darfur and Chad," *A Human Rights Watch Briefing Paper*, International Commission of Inquiry Report, paras. 333-361; Amnesty International, "Darfur: Rape as a Weapon of War," AI Index No. AFR 54/076/2004, July 19, 2004 [online], <http://web.amnesty.org/library/index/Engafr540762004> (retrieved February 22, 2006); "Access to Justice for Victims of Sexual Violence" July 29, 2005.

⁶⁵ See OHCHR, "Third Periodic Report of the United Nations High Commission for Human Rights on the human rights situation in the Sudan," paras. 58-59; SOAT, "Darfur: Rape; Attempted Rape; Risk of Death Penalty," Sudan Tribune, March 20, 2006, at http://www.sudantribune.com/article.php3?id_article=14627.

⁶⁶ "Entrenching Impunity," *A Human Rights Watch Report*, p. 71.

prosecuted successfully. Rape is defined in the Sudanese Criminal Code as sexual intercourse, by way of adultery or sodomy, with any person without his consent. However under *shari'a* law, adultery can only be proved by the confession of the perpetrator, the testimony of four adult men who were witnesses to the act or pregnancy when the woman has no husband.⁶⁷ One reason for the high burden of proof is that if the rape constitutes the crime of adultery or sodomy it is punishable by death. The requirement of multiple witnesses to corroborate witness testimony on rape, which is not typically committed in front of a crowd, makes it very difficult to obtain a conviction and less likely that victims will be inclined to press charges. Judges have refused to convict in cases of rape on the basis of corroborating medical reports in the absence of the testimony of four witnesses.⁶⁸ The burden is on the rape victim to provide corroborating testimony. If a woman chooses to pursue a complaint that she was raped, but fails to prove that, although sexual intercourse took place, she did not consent, she could face charges of adultery (provable by pregnancy if she is unmarried) and, therefore, be in danger of facing criminal charges punishable by death or lashing.⁶⁹ Hence, the definition of rape and the elements proving the crime serve as a disincentive for victims to bring complaints to the police. Indeed, rather than prosecute the perpetrators, the government appears more consistently to fine or prosecute the victims of rape for adultery related offenses, for filing false claims or, in one case, for murder when the victim stabbed a perpetrator.⁷⁰

In addition, Sudanese law requires a rape victim to obtain a “Form 8” from the police to submit to the medical practitioner before receiving medical care for sexual assault. The Form 8, to be completed by qualified medical personnel, was intended to serve as medical evidence of physical harm. However, it is limited in its scope to information

⁶⁷ Evidence Act, Sudan, Article 62. Another provision detailing requirements for proof of *hudud* offenses (which are specific crimes, such as drinking alcohol, adultery, apostasy and armed robbery, for which the Koran prescribes specific punishments) indicates that the testimony of one man is equal to the testimony of two women, thereby implicitly creating the requirement that the rape be witnessed by four men or eight women. Evidence Act, Article 63.

⁶⁸ OHCHR, “Access to Justice for Victims of Sexual Violence,” para. 51.

⁶⁹ *Ibid.*, paras. 35-36, 39, 62.

⁷⁰ Sarah Martin and Mamie Mutchler, “Sudan: The Darfur Plan of Action Has Failed,” *Refugees International* [online], October 5, 2004 [online] <http://www.refugeesinternational.org/content/article/detail/4120?PHPSESSID=5ce00f92779c166324e1d> (retrieved May 30, 2006); Katharine Houreld, “Gang-raped and Pregnant: These Women Thought Their Ordeal Was Over When They Went to the Police. They Were Wrong,” *The Sunday Telegraph*, March 13, 2005 [online], <http://news.telegraph.co.uk/news/main.jhtml?xml=/news/2005/03/13/wsudan13.xml> (retrieved May 30, 2006); See also Louise Arbour’s comments in “U.N. Charges Sudan Ignores Rapes in Darfur by Military and Police,” *The New York Times*, July 30, 2005, Section A, p.8; SOAT, “Darfur: Rape, Attempted Rape; Risk of Death Penalty” March 20, 2006, [online] http://www.sudantribune.com/article.php3?id_article=14627 (retrieved May 30, 2006); UNMIS Sudan Situation Report, April 9, 2006, [online] <http://saindarfur.org/content/view/117/29/> (retrieved May 30, 2006).

about recent loss of virginity, bleeding, or presence of sperm, and does not allow a doctor to fully describe the extent of a victim's physical injuries.⁷¹ The potential problems with the Form 8 are illustrated by a medical report cited in a United Nations High Commission for Human Rights (UNHCHR) paper which states that the victim "had been beaten seriously on her back, there are marks showing the beatings but there was no indication of rape, her hymen was torn a long time before."⁷²

The difficulty of obtaining the form from the police prior to receiving medical attention and the restrictions on allowing international health care workers to fill out the form were the subject of much controversy in the humanitarian community in 2004 and 2005.⁷³ In response to concerns that the procedure prevented victims from obtaining medical care, the Minister of Justice issued a circular that allowed sexual assault victims to receive medical treatment without the form and fill out a Form 8 at a later date prior to a trial if they want to pursue legal proceedings.⁷⁴ However, despite the circular and a joint effort by UNHCHR and the government of Sudan to make these clarifications known in Darfur, UNHCHR reports that in parts of Darfur police still require completion of a Form 8 before the victim may receive medical care—and some doctors also refuse to treat victims without first obtaining a Form 8.⁷⁵ In late November of 2005 the governor of the state of South Darfur issued a decree reiterating that rape survivors have the right to receive medical attention without a Form 8. It further states that women or girls who become pregnant as a result of rape will not be charged with adultery.

Procedural Rights

In addition to flaws in the substantive laws that impede prosecutions, Human Rights Watch has concerns about procedural rights that may implicate defendants' ability to receive a fair trial.

Access to counsel

Article 7 of the Decree Establishing the Special Criminal Court states: "The defendant shall be entitled to be represented by the defense counsel of his or her choice. Such attorney shall be permitted to meet the accused, address the Court on his or her behalf

⁷¹ OHCHR, "Access to Justice for Victims of Sexual Violence," para. 37.

⁷² OHCHR, "Third Periodic Report of the United Nations High Commission for Human Rights on the human rights situation in the Sudan," para. 65

⁷³ OHCHR, "Access to Justice for Victims of Sexual Violence," paras 57-63 .

⁷⁴ Criminal Circular 1/2004, August 11, 2004.

⁷⁵ OHCHR, "Access to Justice for Victims of Sexual Violence," para. 61; "Third Periodic Report of the United Nations High Commission for Human Rights on the human rights situation in the Sudan," paras. 64-65.

and examine and interrogate witnesses within the limits of the statements contained in their depositions.”⁷⁶ The interim constitution and the Code of Criminal Procedure also grant the accused the right to be represented by counsel.⁷⁷ Despite the written guarantee of representation to a counsel of one’s own choosing, the extent to which this right is enjoyed in practice and at what stage the right to representation commences is unclear. The right to be represented during interrogation by police, for example, is not guaranteed. The Rome Statute establishing the ICC, which provides authoritative guidance on international fair trial standards, assures suspects of the right to be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel.⁷⁸ As mentioned above, while the practice so far in the SCCEDs has been inconsistent, there have been reports that in the first six cases before the SCCED, most trials were held in a single day often in the absence of witnesses and defense lawyers. Lawyers representing victims were reportedly subject to harassment.⁷⁹

The right against self-incrimination

This principle is articulated in Article 14(3) (g) of the International Covenant on Civil and Political Rights, which states that the defendant has a right “not to be compelled to testify against himself or to confess guilt.” The Rome Statute states that defendants’ rights include the right “To remain silent, without such silence being a consideration in the determination of guilt or innocence.”⁸⁰ Sudanese criminal law makes no reference to the right of the accused not to have inferences drawn against him if he refuses to testify.

On the contrary, the Decree Establishing the Special Criminal Court on the Events in Darfur allows the court to address any questions it deems necessary to the defendants. Although it states that “the defendant shall not be penalized if he or she refuses to answer those questions,” it then allows the Court freely “to infer whatever conclusions it deems just from such a refusal or such answers.”⁸¹

⁷⁶ Decree Establishing the Special Criminal Court on the Events in Darfur, June 7, 2005, article 7, reprinted in U.N. Doc.S/2005/403.

⁷⁷ The Criminal Procedure Act, 1991, Article 83(3); Interim National Constitution of the Republic of the Sudan, 2005, Article 34(6).

⁷⁸ Rome Statute, Article 55(2) (d).

⁷⁹ SOAT, Annual Report on the Human Rights Situation in Sudan, March 2005-March 2006, April 12, 2006, p. 35.

⁸⁰ Rome Statute, Article 55(2) (b).

⁸¹ Decree Establishing the Special Criminal Court on the Events in Darfur, June 7, 2005, article 11(1)(2)..

Admissibility of coerced statements

Sudanese law does not provide an absolute prohibition on admission of statements obtained as a result of torture. States have a duty to ensure that statements extracted under torture are inadmissible at trial as an element of the absolute prohibition on torture, inhuman and degrading treatment.⁸²

The International Commission of Inquiry stated that when an accused informs the court that a confession was extracted by torture, the court is put on notice to challenge and to rule, giving reasons, on the admissibility of the confession.⁸³ Although Article 115(2) of the Sudanese Criminal Act of 1991 prohibits torture of witnesses or accused, immunity laws could prevent the prosecution of someone accused of torture if he is a member of the national security or police or armed forces. Moreover, the law does not prohibit consideration of coerced testimony. Article 10(1) of the Evidence Act, by which judges of the Special Criminal Court are bound, states “evidence shall not be rejected merely because it has been obtained by unlawful means whenever the Court is satisfied with the genuineness of its substance.”⁸⁴ Article 11(4) of the Decree Establishing the SCCED allows it to convict the defendant on the basis of a confession, but there is no requirement that the court assess whether the confession was made voluntarily or is corroborated by other evidence. The 1991 Code of Criminal Procedure does require criminal courts, in cases punishable by death, amputation or whipping of more than forty lashes, to take several precautionary steps before convicting on the basis of a confession. These include hearing corroborating evidence presented by the prosecution, cautioning the accused as to the seriousness of the admission where admission is the only evidence against him, and adjourning for a period not exceeding one month to allow the defendant to reconsider his confession.⁸⁵

Some defendants in other Sudanese criminal courts have attempted to retract their confessions on the basis that they were obtained by torture. Nevertheless, the *specialized*

⁸² United Nations Human Rights Committee, “General Comment 20 Concerning Prohibition of Torture and Cruel Treatment or Punishment (Article 7),” 44th Sess., para. 12 (1992). Article 15 of the Convention against Torture, which Sudan has signed but not ratified, states that “any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.” See also Concluding Observations of the Committee against Torture: Brazil, 26th Sess., paras. 119(g), 120(g), U.N. Doc. A/56/44 (2001); Concluding Observations of the Committee against Torture: Yugoslavia, 21st Sess., para. 45, U.N. Doc. A/54/44 (1998).

⁸³ International Commission of Inquiry Report, para. 445. Article 12 of the Torture Convention further requires States to ensure that “competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.”

⁸⁴ Article 19 of the Decree on the Establishment of the Special Criminal Court requires the Court to adhere to the 1991 Code of Criminal Procedure and the rules of evidence stipulated in the 1994 law of evidence.

⁸⁵ The Criminal Procedure Act, 1991, Article 144(3).

courts, which, as discussed above, were established in 2003 to deal with unrest in the region and currently co-exist with the Special Criminal Court on the Events in Darfur, have reportedly refused to invalidate the confessions and have failed to open investigations into claims of torture.⁸⁶ There are documented cases in which defendants have been convicted of death penalty offenses on the basis of confessions where there is credible evidence that the confessions were made on the basis of coercion. For example, Human Rights Watch documented the case of a policeman convicted of participating in “rebel insurgency” on grounds of a confession made as a result of torture. He was spared execution only ten minutes before it was scheduled to occur.⁸⁷ In practice, even in the face of medical evidence and testimony corroborating use of torture, Sudanese courts have long ruled confessions extracted by force are admissible.⁸⁸

The Death Penalty and Corporal Punishment

Capital punishment, amputation and corporal punishment are increasingly considered impermissible under international law. International human rights law favors abolition of the death penalty.⁸⁹ The right to be free from torture and cruel, inhuman and degrading treatment is provided for in the International Covenant on Civil and Political Rights (Article 7), the Convention against Torture (Articles 2 and 16), and the African Charter on Human and Peoples’ Rights (Article 5). A state may not invoke provisions of its domestic law in order to justify disregarding its obligations under international law to protect all persons from torture or cruel, inhuman and degrading treatment or punishment. In particular, the Special Rapporteur on Torture advised that “those States

⁸⁶ Amnesty International, “No one to complain to,” p. 35-38; Redress and SOAT, “National and International Remedies for Torture: A Handbook for Sudanese Lawyers,” March, 2005, p. 20 [online] <http://www.redress.org/publications/Sudan05.pdf> (retrieved May 31, 2006).

⁸⁷ “Sudan: Detainees Suffer Arbitrary Arrest, Execution,” Human Rights Watch press release [online], <http://hrw.org/english/docs/2005/09/07/sudan11693.htm>.

⁸⁸ “Sudan: ‘In the Name of God.’ Repression Continues in Northern Sudan,” *A Human Rights Watch Report*, vol. 6, no. 9, November 1994, p. 38 [online], http://www.hrw.org/doc?t=pubspre1998&document_limit=240,20.

⁸⁹ International Covenant on Civil and Political Rights, United Nations General Assembly Resolution 2200A (XXI), U.N. Doc. A/6316 (1966) (entered into force Mar. 23, 1976), Article 6; Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (International Tribunal for the Former Yugoslavia), adopted by the U.N. Security Council Res. 827 (1993) of 25 May 1993, Article 24 [online], <http://www.ohchr.org/english/law/itfy.htm>; Statute of the International Criminal Tribunal for Rwanda, adopted by the U.N. Security Council Res. 955 (1994) of 8 November 1994, Article 23 [online], <http://www.un.org/ict/statute.html>.

The Rome Statute and the Special Court for Sierra Leone also do not permit the death penalty as a punishment for war criminals, which is a further indication of international sentiment opposing the use of capital punishment for even the most serious offenses.

applying religious law are bound to do so in such a way as to avoid the application of pain-inducing acts of corporal punishment in practice.”⁹⁰

Sudanese criminal law, by which the Special Criminal Court is bound,⁹¹ is based on *shari'a* and calls for the death penalty to be imposed for a number of crimes including offenses against the state, murder, adultery (if the defendant is married) or repeated acts of sodomy.⁹² Article 36 (2) of the interim constitution allows the death penalty to be inflicted on children under eighteen years of age for crimes of *hudud* which include offenses proscribed in the Koran such as armed robbery and apostasy. Amputation or public whipping is the prescribed penalty for many offenses including armed robbery, intentional wounding of another, gambling, sodomy, rape, gross indecency, indecent and immoral acts and prostitution.⁹³ These punishments are still in use. On August 31, 2005, the government executed two prisoners convicted of capital offenses committed when the defendants were less than eighteen years of age.⁹⁴ On December 25, 2005, the special criminal court in Zalingi, West Darfur sentenced a defendant to cross amputation of the right hand and left foot after convicting him of murder and robbery.⁹⁵ As of September 18, 2005, 479 people were on death row in Sudan.⁹⁶

Practical Obstacles: Lack of Political Will

Despite the establishment of the new courts and the prosecutor's office, the Sudanese government has done little to demonstrate its professed intent to ensure justice for the crimes committed in Darfur during the conflict. In December 2005, the president of the SCCED, Judge Mahmoud Mohammed Said Akbam, said that the court has been unable to hold accountable individuals who may have committed grave crimes because of the reticence of witnesses and the general insecurity in the region.⁹⁷ Other representatives of

⁹⁰ United Nations Commission on Human Rights, "Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, in Particular: Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, Report of the Special Rapporteur," Mr. Nigel S. Rodley, U.N. Doc. E/CN.4/1997/7 (January 10, 1997).

⁹¹ Decree on the Establishment of the Special Criminal Court on the Events in Darfur, Articles 5(a), 19 and 20(3).

⁹² The Criminal Act, 1991, Articles 50, 53, 130(2), 146(1)(a), 148(2)(c).

⁹³ *Ibid.*, Articles 80(1), 139(1), 148(2)(a), 150(2), 151, 152, 154(1), 168(1)(b).

⁹⁴ *Ibid.*; "Sudan: Detainees Suffer Arbitrary Arrest, Execution," Human Rights Watch press release, September 7, 2005 [online], <http://hrw.org/english/docs/2005/09/07/sudan11693.htm>.

⁹⁵ SOAT, "Darfur: Imposition of Cross Amputation," January 6, 2006 [online], http://www.sudantribune.com/article_impr.php?id_article=13424.

⁹⁶ OHCHR, "Second Periodic Report of the United Nations High Commissioner for Human Rights on the Human Rights Situation in Sudan," p. 26.

⁹⁷ SOAT, Annual Report on the Human Rights Situation in Sudan, March 2005-March 2006, SOAT, April 12, 2006, p. 35.

the Sudanese government have also stated that the government cannot investigate or prosecute individuals responsible for crimes in Darfur because witnesses refuse to come forward and identify the perpetrators.⁹⁸

While it is true that witnesses and victims in general may not trust government prosecutors and police, many victims have nevertheless come forward to file complaints with the police. Reports by the U.N. Commission and U.N. Panel of Experts (in both cases listing names of abusers in confidential annexes to reports), the U.S. Department of State, Human Rights Watch, the international media and others have all named numerous individuals bearing responsibility for crimes in Darfur.⁹⁹ The African Union Mission in Sudan has been providing information about attacks to the government of Sudan through its Cease Fire Commission for nearly two years. One government representative (and one representative each for the two rebel groups) is present on each Cease Fire Commission that conducts any investigation into alleged violations of the cease fire agreement. The reports are prepared by consensus. They contain information about attacks by Janjaweed and the government of Sudan on the civilian population. The reports include names of witnesses interviewed, a summary of their testimony, photos and even the name of the commander of the attacking forces.¹⁰⁰ These reports were signed, and sometimes commented upon, by a high-ranking Sudanese official, often a colonel, as part of the ceasefire monitoring procedure. Yet nothing has been done to follow up with prosecutions, even in those cases that were filed after the SCCED was

⁹⁸ See e.g. "Entrenching Impunity," *A Human Rights Watch Report*, p. 11 (citing an October 10-11, 2004 Human Rights Watch interview with Dr. Abdul-Moniem Osman Taha, in which he stated that "If the name of the leaders is mentioned by defendants or witnesses, we could [try the leaders]. Until now, no one mentioned any names.") See also "If We Return We Will Be Killed," *A Human Rights Watch Briefing Paper*, p. 25.

⁹⁹ See e.g., "Confronting, Ending and Preventing War Crimes in Africa," Pierre-Richard Prosper, Ambassador-at-Large for War Crimes Issues, Testimony before the House International Relations Committee, Subcommittee on Africa, Washington D.C., June 24, 2004 [online], <http://www.state.gov/s/wci/rm/33934.htm> (retrieved May 31, 2006); "Darfur Destroyed," *A Human Rights Watch Report*, p. 45; "Entrenching Impunity," *A Human Rights Watch Report*, Annex 1; Annex to the Report of the Panel of Experts established pursuant to paragraph 3 of Resolution 1591 (2005) concerning the Sudan, U.N. Doc. S/2006/65, January 30, 2006.

¹⁰⁰ See e.g. African Union Ceasefire Commission Reports, Ceasefire Violation Report (hereinafter CVR): Alleged Janjaweed armed militia attack of Khor Abeche on 7 April 2005, CVR No 66/05 (7 Apr 05) [online], <http://www.africa-union.org/DARFUR/Reports%20of%20the%20cfc/CVR%20No%2066-05%20%20on%2007%20Apr%2005.pdf> (recommending that the government of Sudan prosecute Nasr Atijani Abdel Gadir and his cohorts for the crimes committed by his Janjaweed/Armed Militias in the attack on Khor Abeche); Alleged Arab and Bagara herdsmen attack on Duma on 14 February 2005, CVR No 22/05 (20 Mar 05) [online], <http://www.africa-union.org/DARFUR/Reports%20of%20the%20cfc/22-05.pdf> (recommending that the Government of Sudan investigate and prosecute the leaders of the armed herdsmen and tribes involved in the invasion of Romalia Tour, Labanti and Jongul)(retrieved May 31, 2006); Alleged GOS arrest of civilians in Azereba village on 10 March 2005, CVR No 42/02 (12 April 05) [online], <http://www.africa-union.org/DARFUR/Reports%20of%20the%20cfc/42-05.pdf> (concluding that the Government of Sudan violated Art 2(6) of the N'djamena Agreement by arresting and torturing 3 civilians in Azereba on 10 March 05) (retrieved May 31, 2006).

established. NGOs have also filed hundreds of cases with the prosecutor in Nyala many of which include the names of alleged perpetrators. Very few of those cases have been investigated and brought before the courts.¹⁰¹

Evidence of the lack of desire or intent to pursue prosecutions begins with action by the police. UNHCHR reports indicate that “police and other government officials also proactively obstructed justice by refusing to investigate human rights abuses or conducting inadequate investigations of human rights abuses committed by militia in Darfur.”¹⁰² Police have refused to take complaints from victims.¹⁰³ In some cases, the officer in charge claims that the office cannot investigate if the victim cannot identify the perpetrators or otherwise provide the police with evidence.¹⁰⁴ Even when victims identify perpetrators and report their location to the police, police either fail to investigate or arrest suspects. Police have also reportedly refused to investigate cases brought more than twenty-four hours after the crime occurred.¹⁰⁵ Given the difficulties in travel in the region, this could prove a major obstacle to filing of complaints. The failure of the police to investigate further discourages victims from making complaints and fosters an atmosphere of impunity.

Victims who report crimes are also fearful of retaliation by perpetrators.¹⁰⁶ In one instance, a thirty-six-year old woman in an IDP camp in West Darfur was beaten by three army officers in November after attempting to lodge a complaint against a Janjaweed who attempted to kill her daughter.¹⁰⁷

The reason for the lack of accountability in Darfur was summed up by a recent statement by the President of the SCCED, Judge Akbam: “Higher authorities are not interested in these cases to be presented to the court or for them to even come to the knowledge of the court.”¹⁰⁸

¹⁰¹ SOAT, Annual Report on the Human Rights Situation in Sudan, March 2005-March 2006, April 12, 2006, p. 35.

¹⁰² OHCHR, “Second Periodic Report of the United Nations High Commissioner for Human Rights on the Human Rights Situation in Sudan”, January 2006, p. 31.

¹⁰³ Ibid., Access to Justice for Victims of Sexual Violence,” paras. 27,29.

¹⁰⁴ OHCHR, “Second Periodic Report of the United Nations High Commissioner for Human Rights on the Human Rights Situation in Sudan”, January 2006, p. 31.

¹⁰⁵ Ibid, p. 32.

¹⁰⁶ Ibid., p. 33.

¹⁰⁷ :Ibid.

¹⁰⁸ Elizabeth Rubin, “If not Peace, then Justice,” *New York Times Magazine*, April 2, 2006, p. 48.

Treatment of Witnesses and Victims of Sexual Violence

No laws exist to take into consideration the protection and welfare of victims. Sudan is completely devoid of witness and victim protection programs and, in the case of vulnerable victims of rape, no support services or counseling is available from the state. An investigation of two police stations in South Darfur conducted by UNHCHR and the members of the Sudanese government showed that neither police station had female police officers present, no proper procedures existed for registering sexual or gender-based violence cases, and no space was available for survivors to report their complaints confidentially.¹⁰⁹

The lack of support for victims of sexual violence in particular is not simply demonstrated by lack of services and protection. The government's attitude towards rape cases has been one of disregard if not outright hostility.¹¹⁰ On May 30, 2005, the Country Director of Medicins Sans Frontieres (MSF) was arrested and charged with offenses against the state (which carry capital penalties) because of a MSF report publicizing the continuing prevalence of rape in Darfur.¹¹¹ Judge Abkan has said the rape cases the court was looking into were individual cases and that there were no testimonies indicating that rape was the result of a planned and systematic attack.¹¹² The Minister of Justice, Mohamed Ali al-Maradi, has said that reports being published by the western media against Sudan were baseless.¹¹³ In her statement following her visit to Sudan in May 2006, U.N. High Commissioner Louise Arbour stated "In discussing the critical situation in Darfur with Sudanese local and national authorities I was struck, as I was during my first visit, by their efforts to minimize the gravity of the problem. All other accounts differ from official claims that there is no significant problem of rape and sexual violence specific to Darfur, or that the military does not act in concert with armed groups in attacks that frequently result in civilian casualties."¹¹⁴

¹⁰⁹ OHCHR, "Third Periodic Report of the United Nations High Commission for Human Rights on the human rights situation in the Sudan," para. 66.

¹¹⁰ A report of the Sudanese National Commission concluded that Sudanese women did not understand the correct meaning of the word "rape" and that allegations of mass rape publicized outside of Sudan were fictitious. See International Commission of Inquiry Report, p. 117, para. 459.

¹¹¹ OHCHR, "Access to Justice for Victims of Sexual Violence," para. 64.

¹¹² "Darfur rape cases are individual – judge," *Sudan Tribune*, October 25, 2005 [online], http://www.sudantribune.com/article_impr.php3?id_article=12245 (retrieved May 30, 2006).

¹¹³ "Sudan reiterates opposition to try Darfur suspects before [ICC]," *Sudan Tribune*, October 18, 2005 [online], http://www.sudantribune.com/article_impr.php3?id_article=12116 (retrieved May 30, 2006).

¹¹⁴ Statement by UN High Commissioner for Human Rights Louise Arbour Following her Visit to Sudan from 30 April – 5 May 2006 [online] <http://www.hrea.org/lists/hr-headlines/markup/msg02828.html>.

This attitude has filtered down to police stations. Police and other officials reportedly tell victims that they are “lying and making up stories” and refuse to investigate their claims.¹¹⁵ Women who report rapes are often harassed and threatened with prosecution for adultery, bad behavior and acting against the state.¹¹⁶ People who have brought sexual violence complaints to the police have even been arrested for bringing false charges.¹¹⁷ For example, on March 6, 2006, the police arrested a woman on charges of furnishing false information after she reported the rape and abduction of women outside the Ardameta camp. On January 23, 2006, three sheikhs who informed a government delegation to Kereneq, West Darfur about assaults and torture of civilians and the rape of thirty-six women were reportedly arrested the next day by police and charged with making false allegations.¹¹⁸ According to a U.N. document one policeman reported that he was instructed not to report rapes because it is “shameful” and “brings a bad image to Sudan.”¹¹⁹

For the few victims who make it to court, there is no evidence to indicate they will be treated any better by the judicial system. In the only rape case to be brought before the SCCED to date, the sixteen-year-old victim was only informed that the court would hear the case the morning of the hearing. When her lawyers protested, the judge apparently said that given the court’s special status, “even five minutes notice” was sufficient. The judge also refused the victim’s lawyers request for a closed hearing.¹²⁰

¹¹⁵ OHCHR, “Access to Justice for Victims of Sexual Violence,” paras. 40, 41, 43.

¹¹⁶ Ibid., paras. 39, 42; Katharine Houreld, “Gang-raped and Pregnant: These Women Thought Their Ordeal Was Over When They Went to the Police. They Were Wrong.” *The Sunday Telegraph*, March 13, 2005 [online], <http://news.telegraph.co.uk/news/main.jhtml?>

[xml=/news/2005/03/13/wsudan13.xml](http://news/2005/03/13/wsudan13.xml) (retrieved May 30, 2006); OHCHR, “Second Periodic Report of the United Nations High Commissioner for Human Rights on the Human Rights Situation in Sudan”, January 2006, p. 33.

¹¹⁷ See “If We Return We Will be Killed,” *A Human Rights Watch Briefing Paper*, p. 24. (describing how a relative of a victim of a rape in Zam Zam was arrested for filing a false complaint after attempting to report the rape to a police officer).

¹¹⁸ OHCHR, “Third Periodic Report of the United Nations High Commission for Human Rights on the human rights situation in the Sudan,” para. 72.

¹¹⁹ OHCHR, “Second Periodic Report of the United Nations High Commissioner for Human Rights on the Human Rights Situation in Sudan,” January 2006, p. 32.

¹²⁰ See “Entrenching Impunity,” *A Human Rights Watch Report*, p. 71; Elizabeth Rubin, “If not Peace, then Justice,” *New York Times Magazine*, April 2, 2006 at p. 48.

Conclusion

Meaningful accountability is essential for sustainable peace in Sudan. The national courts must take steps to end impunity for the crimes that occurred in Darfur. As things stand, however, Human Rights Watch concludes that the Sudanese government has not shown a genuine commitment to national prosecutions for the events in Darfur. Unless there is a reversal of policy on the part of Khartoum and real political will to punish past atrocities and prevent further crimes, the SCCED will continue to fail to provide any form of accountability or justice for the crimes in Darfur. This failure is all the more stark given that the ICC will only prosecute a limited number of cases and cannot, by itself, provide justice to the thousands of victims of crimes in Darfur.