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PRE-TRIAL CHAMBER I

Before: Judge Claude Jorda, Presiding Judge
Judge Akua Kuenyehia
Judge Sylvia Steiner

Registrar: Mr Bruno Cathala

SITUATION IN DARFUR

Public Document

Observations of the United Nations High Commissioner for Human Rights
invited in Application of Rule 103 of the Rules of Procedure and Evidence

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Executive Summary

In this *amicus curiae* brief, the High Commissioner describes the experience of her Office in engaging in on-the-ground monitoring and investigation of serious human rights violations in the context of States engaged in or emerging from a situation of armed conflict. This experience derives from her Office's field presences in such countries, including as part of United Nations peace missions, and its conduct of or support to formal inquiries established to investigate particularly severe incidents of human rights violations, as well as from other sources. The High Commissioner recognises that the investigation for purposes of criminal prosecution may differ in certain respects from investigations for other purposes such as public reporting, but such a distinction may be difficult to draw with precision, given the substantial overlap.

In respect of the situation in Darfur, the High Commissioner details her deployments of resources over recent years to investigate the commission of serious human rights violations. Her support to the International Commission of Inquiry, whose mandate was specifically to investigate with a view to generating evidence and producing conclusions on the commission of international crimes and individual responsibility under international criminal law, also provides crucial support to her conclusions. The empirical experience has been that retaliation against victims for interacting with the international community, which has at times been suffered, has taken the form of arbitrary arrest and detention and, to a lesser extent, certain forms of physical ill-treatment, but has not extended to loss of life. The documentation of such reprisals in the field does not show that risks for victims are higher in relation to their interaction with human rights investigators.

The High Commissioner argues that risks to victims must be assessed in light of a variety of factors, notably the advantage to the overall protection of a population that can be derived from an international presence, including a criminal investigation advancing and deploying its deterrent effect. Risks can never be eliminated absolutely but can be minimised with the use of tailored and best practice investigative techniques that, *inter alia*, give due weight to the informed wishes of the persons concerned.

In view of this experience, the High Commissioner has called for an increased visible presence of the International Criminal Court in Sudan, as she believes that carefully tailored strategies can operate effectively to conduct investigations. The International Criminal Court's presence on the ground would also importantly contribute, among other international deployments in the country, to a proactive presence increasing the level of protection perceived and enjoyed by the affected population.

I. Introduction

1. Louise Arbour, the United Nations High Commissioner for Human Rights (hereinafter "High Commissioner"), respectfully submits this *Amicus Curiae* brief pursuant to Decision ICC-02/05 of Pre-Trial Chamber I of the International Criminal Court (hereinafter "ICC") dated 24 July 2006 which *inter alia* invited her to submit in writing her observations within a period of 45 days "on issues concerning the protection of victims and the preservation of evidence in Darfur, Sudan". The Pre-Trial Chamber based its Decision ICC-02/05 on Articles 57 (3) (c) and 68 (1) of the Rome Statute as well as rule 103 of the Rules of Procedures and Evidence.

II. Procedural Background

2. The Office of the High Commissioner for Human Rights (OHCHR) was served with a copy of the Pre-Trial Chamber's Decision on 28 July 2006. On 18 August 2006, the Deputy High Commissioner for Human Rights, in the absence and on behalf of the High Commissioner, applied for a variation of time, pursuant to Regulation 35 of the International Criminal Court, requesting an extension of time of 30 days or of such other period as fixed by the Pre-Trial Chamber in the interests of administration of justice. On 28 August 2006, the Pre-Trial Chamber decided to grant the High Commissioner an additional 30 days.
3. Upon reception of the notification of Decision ICC-02/05 and upon consultation with the High Commissioner, the Deputy High Commissioner for Human Rights wrote to the Office of the Prosecutor on 16 August 2006 formally requesting by 25 August 2006 "any further information or material beyond that set out or referenced in the Chamber's Decision which in the Prosecutor's view would be of assistance to her response to the Chamber". A similar request was made on the same date to the Registrar to be transmitted to *ad hoc* counsel to be appointed to represent and protect the general interests of the Defence in the situation in Darfur. On 25 August, Ms. Fatou Bensouda, the Deputy-Prosecutor for Investigations, replied on behalf of the Prosecutor stating that "providing such information at this stage may not be in conformity with the spirit of decision of the Pre-Trial Chamber of 24 July 2006 which requests the Prosecutor to respond to the observations within ten days of their filing." No response was received from *ad hoc* counsel.

III. Preliminary remarks

4. Pursuant to United Nations General Assembly Resolution 8/141 of 7 January 1994, the High Commissioner for Human Rights has a general mandate, *inter alia*, to promote and protect the effective enjoyment by all

of all civil, cultural, economic, political and social rights. The mandate requires her to monitor, assess, investigate and report on the compliance by States with their obligations under international human rights law. Additionally, the High Commissioner executes mandates of relevant United Nations (hereinafter "UN") organs, including investigative and fact-finding mandates of the (then) UN Commission on Human Rights and the Human Rights Council, and performs other human rights functions as requested by the UN Secretary-General and the UN Security Council (hereinafter "Security Council") in the context of maintaining international peace and security.

5. The High Commissioner has exercised her monitoring and investigative mandate in numerous countries at the time beset by, or recently emerging from, armed conflict. In a variety of States, field presences of OHCHR monitor and investigate, in situ, serious violations of international human rights law in the context of armed conflict often also amounting to breaches of international humanitarian law and international criminal law. These violations not infrequently have also possessed, or were coming to be seen as having, massive, widespread and/or systematic character.
6. Thus, for example, in **Colombia** OHCHR has been present since 1997 on the basis of a Memorandum of Understanding (MoU) with the Government, enjoying a full mandate to monitor international human rights and international humanitarian law with 18 human rights investigators throughout the country in the midst of an armed conflict. Since May 2005, also in the midst of a (non-international) armed conflict opposing Government forces and an organized armed group, OHCHR has had a comprehensive mandate in **Nepal** to conduct monitoring and investigations in all parts of the country, with 36 human rights officers specifically dedicated to this activity. Likewise, in **Uganda**, since January 2006, OHCHR has a monitoring and investigation mandate on the basis of an MoU pursuant to which 16 human rights investigators cover the conflict-affected parts of northern Uganda. In other circumstances, investigative expertise has been deployed as a component of a broader UN mission. Thus, for example, in the **Democratic Republic of the Congo**, the Human Rights Division of MONUC comprises 89 human rights investigators. Since March 2000 to date, the mandate of the Division is "to assist [the Government of National Unity and Transition] in the promotion and protection of human rights, with particular attention to women, children and vulnerable persons; investigation of human rights violations to put an **end to impunity**, and continue to cooperate with efforts to ensure that those responsible for serious violations of human rights and international humanitarian law are brought to justice, while working closely with the relevant agencies of the United Nations" (our emphasis).

7. The second pillar of OHCHR's experience in investigating serious violations of human rights has derived from its conduct of, or support to, commissions of inquiry of both international and national character into discrete events or sets of events which gave rise to substantial loss of life and harm to individuals. Thus, in **Togo**, the High Commissioner in June 2005 deployed a fact-finding mission with a mandate to (i) establish the circumstances which led to alleged violations of human rights prior, during and after the presidential election of 24 April 2005, (ii) verify the alleged violations and (iii) report to the High Commissioner on combating resultant impunity and preventing further violence. In **Côte d'Ivoire**, in December 2002, OHCHR dispatched a fact-finding mission following the UN Secretary-General's request to the then High Commissioner to gather precise information on violations of international human rights and humanitarian law in the country. This mission was followed by the establishment, on 8 April 2004, of an independent Commission of Inquiry pursuant to the UN Secretary-General's request to the then High Commissioner to investigate and establish the facts concerning responsibility for alleged atrocities committed in connection with the planned march in Abidjan on 25 March 2004. Furthermore, in accordance with the Linas-Marcoussis peace agreement and at the subsequent request of the Ivorian President, the then High Commissioner established an international commission of inquiry tasked with inquiring into the serious violations of human rights and humanitarian law, throughout the country since September 2002, which undertook its investigations from July and September 2004. In **Timor-Leste**, an independent special commission of inquiry was supported by OHCHR at the request of the Secretary-General, who had been solicited by the Government of Timor-Leste to establish the facts and circumstances relevant to the criminal incidents of 28, 29 April and 23, 24 and 25 May 2006 and clarify responsibility for the events which took place on these dates. In **Lebanon**, OHCHR supported a commission of inquiry established pursuant of Human Rights Council Resolution S-2/1 of 11 August 2006 to investigate aspects of the Lebanon-Israel conflict in 2006, including alleged violations of international humanitarian law. OHCHR has also gained substantial experience servicing mandates of special procedures of the UN Commission on Human Rights and the UN Human Rights Council, who have performed monitoring and investigative functions in countries affected or emerging from conflict. The Commission of Inquiry on Darfur will be discussed below.

8. As a result of this history of engagement, OHCHR has accumulated considerable expertise in the protection of victims and preservation of evidence in respect of serious human rights violations in conflict and post-conflict situations.

9. For clarity and the avoidance of doubt, the High Commissioner wishes to address at the outset two issues to delineate the scope of the present brief. Firstly, the High Commissioner emphasises that the following observations confine themselves to the protection of victims and witnesses from actual or future harm and threats thereof. Actual or future harm and threats thereof in respect of personnel of the investigative body itself raise additional and differing issues which are beyond the scope of this brief. It may be noted that there is a body of international law concerned with the rights and immunities, and corresponding State obligations and responsibilities, under both treaty and customary law, with the object of ensuring respect for and protection of internationally mandated staff undertaking activities, including those of monitoring and investigative nature, pursuant to their mandate.
10. Secondly, for the purposes of this brief, the High Commissioner notes that the Chamber has requested her observations on the protection of "victims". The High Commissioner observes that, in view of the investigative stage of the ICC's proceedings, the term victims is not intended to refer to persons victim of acts that are formally charged and tried, and who have specific rights and status described in the Rome Statute. Rather, at the current investigative phase, the High Commissioner uses the term "victims" to include witnesses, the questioning and examination of whom can give rise to identification of potential specific crimes and the actual victims thereof, be they the witnesses themselves or others.

IV. Expertise developed in the context of monitoring and investigating serious human rights violations in situations of conflict

11. Further to its experience of monitoring and investigation in conflict and post-conflict situations over an extended period of time in field presences and through fact-finding missions and inquiries, OHCHR has developed approaches and tools with the object of maximizing the protection that can be afforded to victims of serious human rights violations and preserving evidence thereof.¹ These practices do not necessarily apply in their entirety to investigations with a view to criminal prosecution generally, or to the current investigation in Sudan in particular. Nevertheless, the commonalities between the enterprises are substantial and the distinctions between the two, such as they are, may often be difficult to make; as a result, these practices are offered by way of consideration for their relevance to the current context and their practical ability to increase protection of victims and witnesses.

¹ For publicly accessible materials, see the *Manual of the United Nations Human Rights Special Procedures* and the *OHCHR Training Manual on Human Rights Monitoring*.

12. At the conceptual level, OHCHR recognizes that a proactive field presence increases the protection space and opens up points of contact for a comprehensive protection strategy. As compellingly demonstrated by a recent study of the Centre for Humanitarian Dialogue,² active presences on the ground deter violations of human rights by influencing political calculations of perpetrators, who are often more sensitive to these elements than assumed. They also encourage and empower civilians to assert rights and take options available to them, by, inter alia, providing less tangible feelings of safety to perpetrators and more sense of solidarity for victims.
13. The key lessons OHCHR has learned may be set out as follows:
 - a) The fundamental point of departure is that a State is responsible for the protection of victims and preservation of evidence subject to its jurisdiction. The former flows, as a matter of international human rights law, from the obligation of a State to protect persons within its jurisdiction from serious violations of human rights, whether inflicted or threatened by State officials or by third parties. The obligation to preserve probative evidence of serious human rights violations is likewise a component of international human rights law that requires States to provide effective remedies for serious human rights violations which, in such cases, generally requires investigation and criminal prosecution of perpetrators. A failure of a State to exercise due diligence in either of these respects is, in principle, a further human rights violation itself attracting the responsibility of a State in international law. The protection of witnesses and preservation of evidence, while also an essential part of the duties and responsibilities of human rights investigators, must be measured and assessed against this basic legal backdrop.
 - b) Protection of victims must be understood in an holistic manner. The protection of victims is usually one component of a complex equation, where issues of protection of witnesses, sources and information, of the investigating body's human rights protection partners (particularly human rights defenders and civil society actors), of other victims of human rights violations, and of the wider population generally, are equally at issue. Protection of individual victims, and the specific measures applicable in a given situation, thus cannot be assessed in the abstract but must take all protective interests into account.

² Mahoney, L.: *Proactive Presences: Field Strategies for Civilian Protection*: Henry Dunant Centre for Humanitarian Dialogue (Geneva, 2006).

- c) Preventive action in relation to protection of victims and preservation of evidence requires conduct of activities in a manner that is as least detrimental as possible to the safety of others. Where risks are present, they must be carefully balanced against the expected benefits of the activity in question. Particularly in the context of limited or non-cooperation by the government, witness protection and preservation of evidence requires sensitive risk analysis and assessment, balancing different factors such as the protection of the person whose life or physical integrity may be threatened, the person's own wishes, and the continuation of the investigative operation in a situation which may require its vital continued presence and active involvement to contribute to reduce violence and protect vulnerable groups against further human rights violations.

- d) It is rare that there can be a complete assurance to victims that the investigating body is in a position to protect them after they have been interviewed, or that their protection can otherwise be totally assured. An element of inherent or residual risk is thus almost always present in the conduct of investigations. The existence of such a risk, however, cannot be held by itself as reason sufficient not to undertake any investigation at all. If that were the case, few investigations in a conflict or post-conflict situation would be capable of significant progress. Rather, it falls to the investigative body, with its experience and understanding of the specific situation as well as its general experience, to assess to the best of its capacities such risks as may be involved and to share the parameters of that assessment with the victims concerned. The victims, for their part, may also have views on the scope of appropriate security measures. In any case, it should be made clear that the human rights investigators cannot absolutely assure the safety of the witness. That said, in the final analysis, the autonomy of victims and their own wishes, fully informed and aware of the relevant circumstances, to proceed and cooperate with the investigation, warrant substantial respect and are central to the assessment of how to proceed with specific investigations of serious human rights violations in such contexts.

- e) As part of a comprehensive protection strategy, an investigative body may seek undertakings or other appropriate bilateral commitments from the Government in question in relation to the issue of retaliation against victims. For example, Article 58 of the Regulations of the Inter-American Commission requires the government to bind itself not to take reprisals against witnesses as a condition of the mission. Some of OHCHR relationship agreements

establishing an OHCHR office in a particular country explicitly set out that the Government, for instance, "undertakes [...] to ensure that no person who has had contact with the Office is subjected to abuse, threats, reprisals or legal proceedings on those grounds alone" or that it "undertakes to respect the status of the Office and its staff, and to ensure that anyone associated with the Office is not subjected in any way to abuses, threats, reprisals or legal prosecution by reason of their status".

- f) At the practical level, components of good investigative practice by which the investigative process can be designed, depending on the particular situation, to mitigate known and emerging risks. These include undertaking interviews in a context in which would not focus unnecessary attention on the witness. Interviewing a significant number of people in a community diminishes attention being focussed on a few individuals, while undertaking interviews occur in a place where surveillance is less likely also reduces risks. Thus, for example, governmental surveillance is less problematic if human rights investigators are mobile and travel around the countryside.
- g) A cardinal principle for investigations of serious human rights violations is respect for the confidentiality of recorded information. A breach of this principle can have serious consequences: (a) for the person interviewed and for the victim; (b) for the credibility and safety of human rights investigators; (c) for the level of confidence enjoyed by the operation in the minds of the local population; and thus (d) for the effectiveness of the operation. In principle, human rights investigators assure the witness that the information communicated will be treated as strictly confidential and consent will be procured for the use of information they provide for human rights reporting or other purposes. If the individual would not want the information attributed to him or her, s/he might agree that the information may be used in some other, more generalized fashion which does not reveal the source. This confidentiality principle is further maintained in OHCHR's cooperation with international criminal tribunals and courts, where the confidentiality of any information provided is a condition of cooperation. Where some information is allowed to be used in court, the risk to the sources of information is maintained at its lowest, including by maintaining the identity of the informant secret, a principle which OHCHR has defended with success before an internationalized tribunal.³

³ Special Court for Sierra Leone: Decision on Prosecution Appeal Against Decision on Oral Application for Witness TF1-150 to Testify Without Being Compelled to Answer Questions on Grounds of Confidentiality, *Prosecutor v Alex Tamba Brima et al.*, Case No. SCSL-2004-16-AR73, Decision of 26 May 2006.

14. In general terms, protection of victims and preservation of evidence requires consultation with potential partners, and strategic cooperation with them. Good knowledge of the terrain, reliable information, careful analysis, clear identification of options and their implications, deference to victims' autonomy and good judgment will help defining the course of action best suited in the circumstances to allow an investigation into serious human rights violations to proceed while minimizing risks to victims and best enabling evidence to be preserved.
15. The High Commissioner offers these products of her Office's experience in investigation of human rights violations to the extent that they may be seen as appropriate and helpful to the current situation before the Pre-Trial Chamber, in recognition of the varying roles and competencies of the organs established and defined by the Rome Statute of the International Criminal Court.

V. High Commissioner's Mandate in relation to Darfur

16. As noted above, the mandate of the High Commissioner involves investigating, often in conflict situations, serious human rights violations, which also frequently amount to crimes under international law (most commonly arbitrary deprivation of life, torture, rape and other outrages against personal dignity). The present section intends to provide the Pre-Trial Chamber with an overview of these investigative activities as they relate to Darfur and the protection of victims.
17. With regard to the situation in Darfur, the High Commissioner has four distinct roles:
 - Establishing a dialogue with the Government of Sudan in accordance with UN General Assembly Resolution 48/141 (1993) and assessing the situation on the ground;
 - Supporting the work of the Special Procedures mandated by the then UN Commission on Human Rights and, the UN Human Rights Council;
 - Supporting the UN Mission in Sudan established under Security Council Resolution 1590;
 - Supporting the Secretary-General in complying with special requests of the Security Council, such as supporting the establishment of the International Commission of Inquiry on Darfur pursuant to Security Council Resolution 1564 (2004).
18. All these roles necessarily require the High Commissioner and her staff to conduct wide-ranging investigations in the field.

A) OHCHR's Initial Engagement with the Situation in Darfur

19. OHCHR's engagement with the situation in Darfur dates back to March 2001 – thus predating the current conflict - with the creation of a technical assistance programme for the Sudan in the field of human rights.
20. Since the eruption of the conflict, many initiatives were undertaken and allowed first-hand investigations to be conducted in the midst of the conflict into the serious and widespread human rights violations being committed.
21. To react to the crisis in Darfur and assess and document first-hand the reported violations, the then Acting High Commissioner for Human Rights sent fact-finding missions to Chad (from 5 to 15 April 2004) and Sudan (from 20 April to 3 May 2004). As a result of these investigations, the report of the two missions recommended the establishment of an international commission of inquiry to examine the situation, identify the crimes that have been committed and their perpetrators, assess the responsibility of the authorities and recommend measures for securing accountability. The report also highlighted the urgent need to deploy UN human rights observers to Darfur. On 7 May 2004, the then Acting High Commissioner for Human Rights briefed the Security Council on the situation as reported by the fact-finding missions.
22. In line with the UN emergency response to the Darfur crisis, OHCHR deployed an advanced team of two human rights staff on 15 July 2004. Eight human rights monitors were deployed to Khartoum and Darfur in August 2004 to support the protection efforts of the UN humanitarian agencies working in Darfur and to monitor, report and follow up on individual cases. The monitoring activities were based on a Joint Communiqué between the Government of Sudan and the UN signed on 3 July 2004.
23. In December 2004, the High Commissioner agreed that the human rights activities should be integrated within UNAMIS and the anticipated UN peace support mission. The High Commissioner appointed a Special Adviser on Human Rights in Sudan due to the seriousness of the human rights situation in Darfur and to oversee the integration with the UNAMIS.
24. On 24 March 2005, the Security Council passed Resolution 1590 (2005), deciding to establish the United Nations Mission in the Sudan (UNMIS). As of mid-2005 all human rights related activities including monitoring, protection and promotion as well as support to special procedures have been implemented through UNMIS Human Rights. The Head of the

Human Rights Unit is also the Representative of the High Commissioner in Sudan. The mandate and work of UNMIS Human Rights is discussed in some details below.

25. Various special procedures of the then Commission on Human Rights and of the Human Rights Council, supported by OHCHR, have also reacted to the crisis in Darfur. Several undertook investigative missions to Darfur at the height of the conflict: the Special Rapporteur on extrajudicial, summary or arbitrary executions, Mrs. Asma Jahangir (June 2004)⁴; the Special Representative of the Secretary General on Internally Displaced Persons (IDPs), Mr. Francis Deng (July/August 2004)⁵, the Special Rapporteur on violence against women, its causes and consequences, Mrs. Yakin Ertürk (September 2004)⁶ and the Independent Expert on Sudan, Mr. Emmanuel Akwei Addo (August 2004)⁷. Individual communications referring to specific cases of serious human rights violations were also sent to the Government by different mandate-holders expressing concerns.⁸ Special Procedures mandate-holders continue to monitor the human rights situation in Darfur as the situation evolves.⁹

B) Establishment of Dialogue with the Government of Sudan and the High Commissioner's Own Assessment of the Situation on the Ground

26. In order to engage in a dialogue with Governments in the implementation of her mandate with a view to securing respect for all human rights, the High Commissioner undertakes field visits to assess the human rights situation on the ground. Alongside meeting senior Government officials, she visits various regions and meets with local officials, civil society and victims of human rights violations, including IDPs, detainees and other groups particularly exposed to human rights violations. Particularly in view of the limited time available to her for field missions, the High Commissioner normally focuses on the gravest human rights violations, which often brings her to countries in the middle of, or emerging from, armed conflict.

⁴ E/CN.4/2005/7/Add.2

⁵ E/CN.4/2005/8

⁶ E/CN.4/2005/72/Add.5

⁷ E/CN.4/2005/11. In Resolution 2005/82, the then UN Commission on Human Rights decided to appoint a Special Rapporteur on the situation of human rights in the Sudan for a period of one year. The Special Rapporteur, Sima Samar, first travelled to the Sudan from 15 to 22 October 2005 (E/CN.4/2006/111) and again from 12 to 17 August 2006.

⁸ Special Rapporteur on the question of Torture, Special Rapporteur on Violence Against Women, Special Rapporteur on Freedom of Expression, Special Representative of the Secretary-General on the situation of Human Rights Defenders and the Chairman-Rapporteur of the Working Group on Arbitrary Detention.

⁹ See, for instance, reports of two missions in October 2005 by the Special Rapporteur on the situation of human rights in the Sudan, (E/CN.4/2006/111), and the Representative of the Secretary-General on the human rights of internally displaced persons, Walter Kälin, (E/CN.4/2006/71/Add.6)

27. Where the High Commissioner considers that the security of persons who are in contact with her may be at risk, like in Sudan, she has, apart from formal undertakings in agreements for the establishment of field offices as noted above, two main ways of diminishing the risk of reprisals: 1) she obtains an undertaking (often taken on the spot, orally) from any Government official accompanying her that no reprisals will be taken against the persons with whom she has been in contact, highlighting that that official will be held personally responsible for any such reprisal; and 2) she ensures adequate follow-up of this undertaking by the human rights monitors working in the field, who are asked to report immediately to her any form of reprisal that they may document.
28. To the best of her knowledge and information, no reprisals have been taken against individuals with whom she has been in contact in any of her country visits, including in Sudan.

High Commissioner's First Mission to Sudan - September 2004

29. In September 2004, the High Commissioner visited Sudan accompanied by the Secretary-General's Special Adviser on the prevention of genocide. The mission provided her with an opportunity to assess the situation first hand. During the visit, the High Commissioner held a series of discussions in Khartoum with senior officials of the Government of Sudan and the United Nations, before travelling to Darfur where she undertook a five-day tour of the region, visiting El Fashir, Nyala and El Geneina, and their environs. In each location, she met with many IDPs, including community leaders and women in the various camps, as well as with local government officials and members of the judiciary, and United Nations staff and non-governmental organizations (NGOs) operating in the area.
30. One of the key decisions from the mission was to increase the number of OHCHR human rights observers gradually in order to meet the increasing protection needs of the population in Darfur. Protection by international civilian presence is one essential step towards effective protection of the civilian population. The Security Council, acting under chapter VII of the UN Charter, has expressed support for the action of OHCHR in the context of the crisis in Darfur, *inter alia* in its Resolutions 1556 (2004) and 1564 (2004).
31. The High Commissioner reported on her mission to the UN Security Council and concluded that the Government had then greatly improved access for the international community in Darfur: she was indeed granted unimpeded access to IDPs and total freedom of movement throughout her mission. However, she highlighted frequent and consistent reports of harassment and intimidation of IDPs who spoke to international

delegations, as well as one account by one such delegation of its inability to move to IDP camps unescorted.

32. The High Commissioner also reported to the Security Council that until the authorities in Sudan ensure a swift processing of human rights violations through the courts, in full respect for international standards of justice, and resulting in appropriate punishment for the violators, there would be no real progress in Darfur. She said that without such small steps being taken, the civilians of Darfur would continue, understandably, to live in fear and to distrust and despise those tasked with their protection. She offered the Government her Office's help and expertise to assist in genuine efforts to support victims of abuse in seeking redress.
33. With respect to the international presence in Darfur at the time, she reported that virtually everyone she met felt that an increased international presence, in and of itself, would provide a noticeable measure of protection. Linked with this, she urged the Government of Sudan to renounce publicly acts of intimidation against those civilians and human rights defenders who interact with the international community, and reprimand officials who engage in such intimidation.

Second Mission to Sudan May 2006

34. The High Commissioner's second mission to Sudan and Darfur took place from 30 April to 5 May 2006, where she met with a range of different interlocutors, similar to the first visit described above.
35. The human rights related issues that emerged from this visit to Darfur can be clustered around three main themes: (i) the continued, and in some cases exacerbated, threat to physical security of the civilian population, including IDPs; (ii) the tightening of national security control over civilians and civil society actors; and (iii) the lack of accountability and almost complete impunity for those responsible of serious human rights violations.
36. She concluded that a year and a half after her first mission, the situation was just as critical, and in some respects worse. There were continuing attacks on civilians, raids and pillaging of villages and rape and gender-based violence. She concluded that despite the overwhelming presence of the national security apparatus throughout Darfur, there was no apparent minimum level of physical protection for the communities affected by the conflict. On the contrary, the pervasive presence of the national security apparatus inspires fear and apprehension among IDPs and their host communities. She found 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.

37. She reaffirmed that ensuring the protection of the people of Sudan, and necessarily the people of Darfur, is primarily the responsibility of the Government of Sudan. She noted also that the world's leaders unanimously enshrined in the outcome document of the World Summit in September 2005 that when a State is unable or unwilling to safeguard its population from genocide, war crimes, ethnic cleansing and crimes against humanity, the responsibility to protect is to be shared by the international community. She noted that the responsibility to protect entails not only putting an immediate stop to violations: it also means prevention and prosecution. Where impunity is allowed to prevail, protection will remain elusive. She said that the international community took a significant step in this direction in the case of Darfur when the Security Council referred the situation to the ICC. She concluded that it was important for the ICC to exercise its mandate with relation to Darfur robustly and visibly, with the full cooperation of the Government of Sudan and the support of the international community.

C) Supporting the Human Rights Work of the United Nations Mission in Sudan

38. The bulk of the human rights investigative work in respect of Darfur is done through the numerous human rights monitors based in the field.

i) Background Information and Methods of Work

39. As noted above, the general mandate of UNMIS Human Rights is derived from Security Council Resolution 1590, which calls for ensuring an adequate human rights presence, capacity, and expertise within the mission to carry out human rights promotion, civilian protection, and monitoring activities.
40. As already noted (see paragraph 32, *supra*), the monitoring activities of UNMIS Human Rights in Darfur are based on a Joint Communiqué between the Government of Sudan and the UN signed on 3 July 2004. In the Communiqué, the Government of Sudan commits to (a) undertake concrete measures to end impunity, (b) undertake immediate investigation of all cases of violations, including those brought to its attention by the UN and the African Union (henceforth "AU"), (c) ensure that the Independent Investigation Committee, established by the presidential decree in May 2004, receives the necessary resources to undertake its work and that its recommendations are fully implemented, (d) ensure that all individuals and groups accused of human rights violations are brought to justice

without delay, (e) allow the deployment of human rights monitors, (f) establish a fair system, respectful of local traditions, that will allow abused women to bring charges against alleged perpetrators.

41. Currently there are 36 human rights officers and 10 language assistants deployed in Darfur. These investigators are divided as follows: 12 in El Fasher covering North Darfur, 10 in Nyala covering South Darfur, 10 in El Geneina covering western West Darfur and four in Zalingei covering eastern West Darfur.
42. Routine activities of human rights investigators include:
 - Interviewing victims, their family members and other witnesses who have first hand information on human rights violations, and verifying their statements with second hand sources including from sheikhs, other community leaders, NGOs, lawyers and government officials.
 - Engaging with local police to discuss and verify investigation methods, proper conduct and procedure with respect to receiving and filing complaints, reasons for not filing a claim or failure to investigate a given case and compliance with criminal procedure in conducting routine police activities.
 - Monitoring of trials and meeting with prosecutors, judges, and defense lawyers to raise general administration of justice concerns in a particular region as well as specific concerns with respect to the handling of a case or whether a trial is being administered properly in accordance with due process and fair trial guarantees.
 - Visiting prisons and detention centers to interview detainees, monitor any abuse, assess quality of prison conditions, confirm proper admittance and discharge procedures, determine resource constraints and confirm proper pre-trial procedures (amount of time on remand, right to counsel, charges filed, etc.)
 - Regular meetings with national, state and local Government officials to raise issues of concern and recommend corrective actions.
43. The vast majority of information collected consists of victim and witness testimony. The evidence is safeguarded in accordance with the principles of confidentiality described above. In addition to collecting testimonial evidence of violations of human rights and/or humanitarian law, the unit prepares a number of reports for different levels of publication and publicity. Victims remain anonymous in all reports, although in reports internal to UNMIS Human Rights, initials may be used. The level of detail disclosed regarding specific incidents varies according to the perceived threat to the victim either from government harassment; reprisal by the perpetrator, his or her tribe or family; or social stigma.

ii) Reprisals against Civilians for Interaction with the 'International Community'

44. The Government of Sudan remains generally obstructive of any international effort to increase visibility of and accountability for violations of international human rights and humanitarian law, and it has often retaliated against complainants and people who engage with the international community. Moreover, victims may be susceptible to retaliation from opposing tribal groups as the Darfur conflict becomes increasingly factionalized and ethnically-divided.
45. UNMIS Human Rights has documented several instances of government retaliation against complainants. It is worth noting at the outset that UNMIS Human Rights has not documented any case of killing as a suspected form of reprisal for interacting with the 'international community' (killing of the particular individual or a member of his/her family). However, other forms reprisals, from arrest for questioning to physical mistreatment or threats thereof, have been documented. For obvious security reasons, these cases need to remain confidential. However, it is appropriate to note here the broad categories of reprisals documented and the suspected circumstances leading to them.
46. Generally speaking, the main form of reprisal documented by the UNMIS Human Rights has been the arrest and detention of one or many persons, mainly by the police or agents of National Security, after they have interacted in specific occasions with international NGOs, AMIS and UN agencies, or of human rights defenders and nationals who work closely with them generally, or speak out on human rights issues.
47. In some cases, formal charges have been brought against the individuals. Examples include allegations of furnishing false information after alleging rape in connection with a series of militia attacks, as well as charges of kidnapping, violations of the Forestry and National Resources Act, murder, etc. In many cases, the individuals were released and the charges dismissed for lack of evidence. Often, though the individuals were allegedly arrested in connection with one of these and other alleged offenses, they were in fact questioned about their meeting or interaction with the 'international community'. In the vast majority of these cases of arrest and detention, no beating, torture or other form of physical mistreatment were reported.
48. In a few cases, individuals arrested did receive threats, including death threats. Some individuals were also subject to physical violence, including beating on the head during police questioning, beating with iron and

plastic sticks, etc. At least in the last year or so, only one documented case of reprisal seems to have been linked to a person's interaction with human rights investigators. The case involved serious violence and threats following a visit of such investigators to a National Security detention center. Other cases do not involve retaliation for interaction with the 'international community', but involve punishment for cooperating with an official investigation into militia attacks.

49. It is worth noting that people have also been discouraged from cooperating closely with the international community by the continuous suspicion exhibited by government officials for national staff members of international organizations and other people who work too closely with such organizations. These persons have often been questioned and arrested. In many instances, where there has been public unrest, the first people targeted by Government have been those with ties to the 'international community', as these people are under constant suspicion.
50. The High Commissioner notes that the Government has formally committed itself to bringing perpetrators of human rights violators to justice in Joint Communique of July 2004. In principle, this commitment would include not punishing people who speak out about human rights violations - as a fundamental means of achieving justice. UNMIS Human Rights has sought informal assurances from the Government in an attempt to protect victims from reprisals. It also follows up on interviewees when there is threat of retaliation by the Government.
51. Notable is that the Sudanese legal framework does not include special provisions for the protection of victims or witnesses. Although Article 4(e) of the Criminal Procedure Code of 1991 prohibits "prejudice to witnesses" and Article 56 of the Code prohibits intimidating of witnesses during the trial proceedings and provides witnesses with the remedy of filing a complaint against the harasser, the law does not include provisions for the physical protection of victims and the relevant justice institutions (police, prosecution, courts) do not employ protective measures such as anonymous testifying or protective living arrangements.

D) Victims Protection in the context of the International Independent Commission of Inquiry on Darfur

52. While, as noted above, human rights investigators document potential serious human rights violations that often also amount to crimes under international law, the particularity of commissions of inquiry is that their mandate is often directly to investigate crimes and determine individual criminal responsibility. In that regard, their experiences with respect to victim protection is particularly relevant to the ICC. This present section

highlights the most relevant aspects of the experience of the International Commission of Inquiry on Darfur (henceforth the Commission), the most ambitious and far-reaching exercise supported by OHCHR thus far.

53. The Commission was established pursuant to United Nations Security Council Resolution 1564 (2004), adopted on 18 September 2004. The Resolution, passed under Chapter VII of the United Nations Charter, requested the Secretary-General rapidly to set up the Commission. In October 2004 the Secretary-General appointed a five member body and decided that the Commission's staff should be provided by the Office of the High Commissioner for Human Rights. OHCHR created a secretariat of more than 30 staff composed of legal and human rights researchers; investigators; military analysts; experts in gender violence and forensic experts.
54. The Commission had a three-tier mandate: a) "to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties"; b) "to determine also whether or not acts of genocide have occurred"; and c) "to identify the perpetrators of such violations" "with a view to ensuring that those responsible are held accountable". These tasks, particularly the last one, share many similarities with the work of the ICC in Darfur.
55. As the Commission's Final Report indicates, the Commission made two different visits to Sudan, including Darfur, where it met with a number of high level officials, representatives of NGOs, political parties, and interested foreign government representatives in the Sudan. In addition to meetings with the United Nations representatives in the country, the Commission also visited various detention centers, met with local officials, visited camps of IDPs, and spoke with witnesses and tribal leaders. Investigation team members remained in Darfur for investigations for the major part of the three-month mandate of the Commission.
56. In order to manage the more than 20,000 pages of material it received, the Commission developed a database in which it recorded bibliographic and evidentiary details. The incidents' analysis carried out by the research team also was recorded in the database as a way to facilitate swift access by the Commissioners and staff to resource material and source information. At the end of the Commission's mandate, the information collected was given to the High Commissioner, for her to hand over to a competent prosecutor. After the Security Council's referral to the ICC, the High Commissioner handed over to the ICC Prosecutor 9 boxes of evidentiary material gathered by the Commission.

57. As far as cooperation by the Government of Sudan is concerned, it is worth noting once more that Security Council Resolution 1564 (2004) creating the Commission was adopted under Chapter VII of the United Nations Charter. Paragraph 12 of the Resolution, which requests the Secretary-General to establish an international commission of inquiry, also "calls on all parties to cooperate fully with such a commission". By way of comparison, the High Commissioner notes that Security Council Resolution 1593 referring the situation of Darfur to the ICC is unequivocal on the obligation of cooperation by the Government of Sudan and grants the ICC with uncertain authority in that regard. Indeed, it should be recalled that it '[*decides*] that the Government of Sudan and all other parties to the conflict in Darfur *shall* cooperate fully with and provide any necessary assistance to the Court and the Prosecutor' (High Commissioner's emphasis).
58. On the basis of the authority of Resolution 1564, but also as is the practice for commissions of inquiry supported by OHCHR, the Commission developed criteria to appraise such cooperation. In particular, cooperation was assessed on the basis of, inter alia, (i) freedom of movement throughout the territory of the Sudan; (ii) unhindered access to all places and establishments, and freedom to meet and interview representatives of governmental and local authorities, military authorities, community leaders, non-governmental organizations and other institutions, and any such person whose testimony is considered necessary for the fulfilment of its mandate; (iii) free access to all sources of information, including documentary material and physical evidence; (iv) appropriate security arrangements for the personnel and documents of the Commission; (v) protection of victims and witnesses and all those who appear before the Commission in connection with the inquiry and, in particular, guarantee that no such person would, as a result of such appearance, suffer harassment, threats, acts of intimidation, ill-treatment and reprisals. In practical terms, the Commission sent a letter to the Government outlining the minimum criteria noted above (para. 28 of the Commission's Report).
59. The Commission also highlighted in its Report the following assurances regarding the work of the Commission that were given to the Secretary-General by the Minister of Justice: a) the Government would accept the report of the Commission, whatever its findings; b) witnesses of incidents would not be subjected to maltreatment; and c) following strict instruction from the President, Omer Hassan Al-Bashir, no Sudanese officials would obstruct the Commission's investigations.
60. The Commission further noted that the Government did not impede the conduct of its work in Sudan and that both the Government and the rebel groups willingly accepted to cooperate with the Commission. Despite

these assurances however, the Commission reported a few episodes indicative of pressure put by some regional or local authorities on prospective witnesses or witnesses already interviewed by the Commission.¹⁰

61. Immediately after the submission of the Commission's Report to the Secretary-General, the High Commissioner appointed a Witness Protection Officer joining the team of human rights observers in Sudan. His task included investigating and following up on any reports of threats or harassment of any persons allegedly related to their presumed contact with the International Commission of Inquiry on Darfur. The expert was requested by the end of the one month mission, to submit a final report to the Acting Director of the Human Rights component of UNAMIS containing an analysis of the threats/harassment, if any, and recommend steps that should be taken in the future by OHCHR/Mission in Sudan.
62. While the report of the expert remains confidential due to the sensitive nature of the information it contains, the High Commissioner would like to highlight the expert's general conclusion that "overall, there are no serious threats or even indications of possible threats targeting witnesses directly related to the International Commission of Inquiry's work". The expert noted however that "nevertheless, special attention should be paid to them around the period between the Security Council decision about the institution that would prosecute the perpetrators, and the physical deployment of the investigators of this institution on the ground."
63. According to UNMIS Human Rights, who carefully monitored the situation and focused on post-Commission assessment, there was no incident or case of reprisals documented as a result of the referral to the ICC by the Security Council.

VI. Key Implications of the Above Observations for ICC Investigations in Darfur

64. The above observations clearly demonstrate in the High Commissioner's view that it is possible to conduct serious investigations of human rights

¹⁰ It reported that for instance, in the first week of November 2004, in El Fashir (North Darfur) a government official, reportedly the chief of the local office of the National Security and Intelligence Service, gave money to some IDPs and urged them not to talk to the Commission. It was also reported to the Commission that the Sudanese authorities had deployed infiltrators posing as IDPs into some camps such as Abushouk. In the same camp various eyewitnesses reported an episode that could be taken to amount to witness harassment. On 19 December 2004, around 12.30 in the afternoon, approximately twenty vehicles and three trucks drove through the camp. They stopped in the centre of the camp and started shouting: "We killed the Torabora (a common word used for indicating the rebels). We killed your fathers, your brothers. You have to sleep forever." Women and children in the vicinity ran away, returning only after the soldiers had left the area. People in the camp were very worried about the safety of the entire camp. (see para. 35 of the Report).

violations during an armed conflict in general, and in Darfur in particular, without putting victims at unreasonable risk. Generally speaking, the risk of reprisal to victims is an inevitable factor to take into consideration for all international actors working in tense environments, and most acutely in a situation of war. From the documentation of such reprisals in Darfur, it does not appear that risks for victims are higher in relation to their interaction with human rights investigators. As has been observed above, civilians in Darfur face retaliation for interacting with very diverse international actors, including relief workers and medical personnel, and the number of documented cases linked to human rights investigators is remarkably low.

65. As has also been observed, the types of human rights violations documented and investigated in an armed conflict environment more often than not amount also to crimes under international law. From this flow a number of considerations applicable to investigations conducted by the ICC.
66. As noted above, protection of victims has to be understood in an holistic manner, from the protection of witnesses, sources and information, to human rights protection partners (particularly human rights defenders and civil society actors), victims of specific human rights violations, and the population generally. This is particularly true where an ongoing armed conflict threatens the civilian population on a daily basis, where the pattern of violations they suffer is well-documented and continuing, where there are reasonable grounds to believe that (high-ranking) government officials are responsible for these violations, and where the authorities are unable or unwilling to contribute to a reduction of violence by investigating and prosecuting themselves the documented cases of violence.
67. Particularly in these difficult circumstances, the High Commissioner respectfully submits that the careful assessment by the ICC Prosecutor of risks to witnesses and victims needs a balancing of different factors, which obviously include the protection of the persons whose lives may be threatened by interacting with one's investigators, but also, and importantly, the effect of the international operation in question on a situation which may require its continued presence, or active involvement, to contribute to the reduction of violence and protection of vulnerable groups against further violations.
68. In the particular case of the ICC investigation in Darfur, this balancing may require amongst other things a determination of whether the possible risks created by victims' contact with ICC investigators are greater than the danger they face daily by the continuation or escalation of the conflict and

commission of related crimes. This determination in turn must take into account the potential deterrent effect of ICC investigations on the perpetrators of the very crimes that put the civilian population at risk and thus of its impact on the general reduction of violence.

69. The High Commissioner further notes in that regard that the willingness of victims to expose themselves to a calculated level of risk if they perceive greater benefits for them or their communities from their involvement with the international presence should not be underestimated nor taken for granted. A careful assessment in the field is of the essence and the wishes of victims themselves a key consideration.
70. The High Commissioner notes that the recent study produced by the Center for Humanitarian Dialogue¹¹ shows that unarmed international presence in a conflict zone is much more effective than often assumed for the protection of civilians. It highlights that such a presence can create an atmosphere in which the costs of abuse are more apparent to the perpetrators of violence against civilians. It can also provide a safer space for civilians paralyzed and stigmatized by terror tactics. This international presence is composed of a widely diverse international deployment, of which the High Commissioner's office is fully part and of which, she respectfully submits, the ICC must also clearly be part.
71. The High Commissioner notes that not only the Security Council, *inter alia* in its Resolutions 1556, 1564, 1590, 1591, emphasized the urgent need for justice, but also the very parties to the conflict in Darfur insisted on the principle of accountability. Thus, in the Protocol on the Improvement of the Humanitarian Situation in Darfur, of 9 November 2004, the parties "[stressed] the need to restore and uphold the rule of law, including investigating all cases of human rights violations and bringing to justice those responsible, in line with the AU's expressed commitment to fight impunity" (preamble § 7). Moreover, the parties to the conflict, at Article 2(8), committed themselves to "[e]nsure that all forces and individuals involved or reported to be involved in violations of the rights of the IDPs, vulnerable groups and other civilians will be transparently investigated and held accountable to the appropriate authorities".
72. The Security Council reaffirmed recently in Resolution 1674 (2006) that "ending impunity is essential if a society in conflict or recovering from conflict is to come to terms with past abuses committed against civilians affected by armed conflict and to prevent future such abuses..." (High Commissioner's emphasis).

¹¹ *Op.cit.*, note 3.

73. The High Commissioner notes that in the Preamble of the Rome Statute, the State parties indicate their determination "to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes".
74. The UN Secretary-General has recently reminded the Government of Sudan that it cannot escape accountability for atrocities perpetrated against the people of Darfur, the very people that the Government of Sudan has the primary responsibility to protect.
75. The High Commissioner observed recently, at the second session of the UN Human Rights Council, that the Security Council's referral of the situation of Darfur to the ICC more than a year and a half ago, was a significant step towards ending the impunity that the perpetrators of international crimes in Darfur have enjoyed so far. In light of the continued and clear failure or unwillingness by the Government of Sudan to hold them to account, she noted that the ICC must be able to exercise the full force of its mandate. To this end, she said that it was imperative that the UN Member States give their unequivocal support to the work of the Court, and remind the Government of Sudan that its cooperation with the International Court is not optional, but rather an obligation stemming from a UN Security Council decision taken under Chapter VII. She noted that such cooperation must include unfettered access for exhaustive investigations to be carried out in Darfur. The Government of Sudan must also ensure that testimony can be heard and collected freely and, crucially, that witnesses are enabled to come forward without fear of retribution.
76. The High Commissioner is of the view that the promise of the ICC is that, contrary to *ad hoc* tribunals created *ex post facto*, it has the potential of being effective *during* armed conflicts and to contribute to the effective prevention of current crimes and general reduction of violence. The ICC's potential power of deterrence can thus be more situation-specific and makes it a tool without equivalent for the international community, as is evidenced from the Security Council very referral in the present case.
77. This potential effect is also recognized by various provisions of the Rome Statute, notably at Article 58 (1) (b) (iii), which grants power to the Pre-Trial Chamber, at any time after the initiation of an investigation and on the application of the Prosecutor, to issue a warrant of arrest of a person if, having examined the application and the evidence or other information submitted by the Prosecutor, it is satisfied, amongst other things, that the arrest of the person appears necessary "to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances".

78. Though the ICC clearly does not bear alone the burden of protection of victims generally in Darfur, it is the High Commissioner's view that its potential positive impact on victims generally cannot usefully be separated from the more specific issue of particular individual victims' protection. An essential cautious approach with respect to the latter cannot and should not be dissociated from a fair assessment of the former.
79. The High Commissioner notes that the human rights investigators in Sudan continue to document a pattern of human rights violations against the civilian population, and a continued failure by the Government of Sudan to hold the perpetrators to account.
80. The High Commissioner recognizes that investigations of crimes in a conflict environment, similarly to the monitoring of human rights, will inevitably encounter serious security issues. She respectfully submits that the security challenges particular to investigation of international crimes while an armed conflict is ongoing should not *per se* prevent the Court from acting in pursuance of its international mandate towards timely and effective individual criminal accountability. To the extent that security impediments are created by the very perpetrators the Court is investigating in an effort to defeat its investigations, rather than serve as a deterrent, the existence of the Court risks being seen as exacerbating violence and insecurity. This must be avoided by the ICC pursuing all available avenues to ensure that it fulfills its mandate to deliver justice in a timely fashion, insisting, as it is entitled to, on the full support of the Government of Sudan and of the international community.



Louise Arbour

Dated this 10th day of October 2006

At Geneva, Switzerland.