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TAGS: PREL, KAWC, PHUM, SU, SG

SUBJECT: SUDAN TRIBUNAL DEMARCHE: SENEGAL

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REF: (A) STATE 21439; (B) STATE 18235; (C) USUN 0241

CLASSIFIED BY S/WCI ELIZABETH H. RICHARD, ACTING, REASONS  
1.4 (B) AND (D)

1. (U) This is an action request; please see para. 4. Given the importance of this issue and its urgency, the Department requests that talking points and concept paper be delivered as soon as possible by the Ambassador to President Wade.

2. (C) To prosecute the war crimes committed in Darfur, we are promoting an African Union-United Nations hybrid court (or Sudan Tribunal) as an alternative to the International Criminal Court (ICC) (Reftels). Securing African support is central to our strategy, and we understand that Senegal is a key player on African justice issues, among other matters.

3. (C) Our proposed AU-UN court could share the existing physical infrastructure of the International Criminal Tribunal for Rwanda (ICTR) at least initially, although the final decision on where to locate it would be for the AU to decide. The UN Commission of Inquiry (COI) report: (i) recommends that the UN Security Council refer Sudan war crimes to the ICC, (ii) found that the GOS and jingaweit militia had committed crimes against humanity, (iii) concluded the GOS had no policy of genocide, but that individuals may have had genocidal intent. At the UN, we have shared elements of our draft Sudan resolution on the formation of an AU-UN Sudan tribunal. We do not support an ICC referral for Sudan. The AU-UN Sudan Tribunal concept paper below provides a more detailed background on this Sudan Tribunal concept.

4. (C) This issue has been under intense discussion among African leaders and in the wider international community since the delivery of the COI report on January 25. We believe we are approaching the point where the AU will have to express an opinion on a mechanism for accountability, and we believe one more push at the highest level could be crucial to our effort. Ambassador is therefore requested to deliver the attached talking points and concept paper to President Wade.

5. (U) Begin talking points:

-- The UNSC continues to actively support the pursuit of peace in Sudan - both in context of the North-South peace

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process and in Darfur.

-- We welcome the work by the UN Commission of Inquiry on Darfur. We share deep concern about continued violence and atrocities in Darfur, as laid out in the report.

-- We believe our immediate focus needs to be on stopping the violence and helping the victims. We strongly support accountability.

-- Our position on the International Criminal Court (ICC) is well known. We are not seeking to undermine the ICC; rather, we believe our approach is a better one on the merits and believe it is an internationally accepted means of achieving accountability.

-- We believe the best mechanism is a UN Security Council-created tribunal which is administered jointly by the African Union (AU) and the UN. Initially, it could share the infrastructure of the International Criminal Tribunal for Rwanda (ICTR) in Tanzania, though the final decision on location would be for the AU to make.

-- Since an infrastructure is already in place in Arusha, we believe an AU-UN court could begin operating quickly.

-- This approach respects the AU role in building institutions and solving problems in Africa. It also ensures African ownership in securing justice and accountability on the continent, while giving it strong support and expertise from the UN and the international community.

-- The AU has played a critical leadership role in international efforts to resolve the conflict in Darfur; this type of court would allow the AU to continue that leadership role as accountability is pursued and would also contribute to development of the AU's overall judicial capacity on the continent. This increased capacity might also help in establishing the AU's planned "Court of Justice." A Court of Justice, if created, could be a method of burden-sharing on justice issues, thereby helping to relieve overburdened national judicial systems.

-- We understand that the AU has not yet reached a decision on the site of a future Court of Justice. We believe that, regardless of the final location, the increased human capacity for justice gained through the Sudan Tribunal experience by prosecutors, judges, and other African personnel would be put to good use.

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-- A Sudan Tribunal will reflect a strong partnership between the international community, particularly the UN, and Africa.

-- We have garnered interest and support for the Tribunal concept from several African nations.

-- The ICC does not have temporal jurisdiction to prosecute the full range of crimes referred to by the UN's Commission of Inquiry given that some of the crimes were committed prior to July 1, 2002.

-- We would appreciate your views on the Sudan Tribunal concept. We understand that several African leaders are meeting in Chad next week to discuss Sudan. If you support our the Sudan Tribunal concept, we believe a call from you to Presidents Obasanjo and Mbeki prior to that time would be very helpful.

-- For your information, when our Ambassador briefed President Obasanjo on the AU-UN Tribunal idea, Obasanjo asked how indictees would be selected, and what role Sudanese government would play in the court. Under our proposal, indictment decisions would be made by court prosecutor, who would be appointed by AU and UN. Sudan's role would be determined by AU and UN, who would jointly administer court. In contrast, Sudan would have no role in ICC-based trials.

-- Obasanjo also asked our Ambassador about how our proposed court would be supported financially. Any court that takes on Sudan war crimes would have to be expanded; the ICC has limited presence in Africa and is occupied with other investigations; in contrast, ICTR has extensive infrastructure on the ground; the ramp-up time and money will be much less for an AU-UN Sudan Tribunal. We plan to request substantial funding for the Sudan Tribunal from Congress.

Additional point for use at Post's discretion:

-- So far the only referrals to the ICC have related to activities in Africa.

AU-UN SUDAN TRIBUNAL CONCEPT PAPER:

Overview

We share deep concern about the on-going human rights

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violations and atrocities in Darfur and strongly support a call for accountability for those responsible for these crimes. We suggest that a "Sudan Tribunal," created and mandated by a UN Security Council resolution and administered by the UN in conjunction with the African Union (AU), provide this accountability. The AU has played a critical leadership role in international efforts to resolve the conflict in Darfur; this type of court would allow the AU to continue that leadership role as accountability is pursued and would contribute to development of the AU's overall judicial capacity on the continent. This increased capacity could help establish the African Union's planned "Court of Justice." We think this approach is more appropriate than referral to the International Criminal Court (ICC), as it takes full account of and reinforces the AU role in addressing the Darfur conflict. In addition, the ICC does not have temporal jurisdiction to prosecute the range of crimes referred to by the UN's Commission of Inquiry in that some of these crimes were committed prior to July 1, 2002.

### Mandate

Under Chapter VII of the UN Charter, the proposed Sudan Tribunal would have authority to prosecute those individuals most responsible for serious violations of international humanitarian law committed in Darfur. The Tribunal would operate for 3-5 years, renewable annually as needed.

### Infrastructure and Personnel

The Tribunal could be based in Arusha, Tanzania, at least initially, and could share the existing infrastructure of

the International Criminal Tribunal for Rwanda (ICTR) to take advantage of personnel, systems, and facilities. We would look to the African Union on where the tribunal should ultimately be located. This would allow the court to begin operations without delay. The Tribunal would have its own judges and Prosecutor. Personnel would be appointed by the UN Secretary-General in coordination with the AU. There would be both international staff members and AU staff members involved. Countries could second additional international staff to the Tribunal on a voluntary basis.

The administrator of the ICTR could initially handle management of the Sudan Tribunal, and could appoint deputy administrators for the ICTR and Sudan Tribunal. This arrangement would facilitate the sharing of infrastructure

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-- and avoid conflicts over resources -- by empowering one official to make the necessary decisions and tradeoffs. Having a single administrator would also allow the Sudan Tribunal to use the ICTR's standard operation procedures (as appropriate), rather than having to draft new regulations.

### Funding

Start-up costs for the Tribunal's first 6-8 months of operations are estimated at \$30 million. As the Tribunal becomes fully operational, we anticipate that the costs will rise, depending on the availability of seconded international staff, infrastructure needs in Arusha, and the number of indictees/trials; however we believe the costs will be manageable. Our preferred funding option for the Tribunal is UN assessed contributions. Any court that takes on Sudan war crimes would require an expansion of its staff and budget. The ICC, for example, has a limited presence in Africa, and this staff is occupied with the Uganda and Congo investigations. The ICTR, in contrast, has extensive infrastructure on the ground, and it has established relationships with governments throughout the continent. We therefore do not see a

significant difference in cost between the ICC and an AU-UN hybrid court.

End talking points and concept paper.

6. (U) Khartoum minimize considered.

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