

Annex E



FIFTEENTH REPORT OF THE PROSECUTOR OF THE INTERNATIONAL CRIMINAL COURT TO THE UN SECURITY COUNCIL PURSUANT TO UNSCR 1593 (2005)

INTRODUCTION

1. On 31 March 2005, the Security Council adopted Resolution 1593 (2005), determining that the situation in Sudan continued to constitute a threat to international peace and security and, acting under Chapter VII of the Charter, referring the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court.

I - REPORT ON THE JUDICIAL ACTIVITIES

2. The Prosecutor has presented fourteen reports to the Council since the adoption of Resolution 1593 (2005). They describe the Court's judicial activities pursuant to the Rome Statute. The reports also show how the individuals charged by the Court have taken advantage of their position of power within the Sudanese government to ensure their own impunity, have refused to cooperate with the Court and have refused to abide by the Resolutions of the UN Security Council. The Office has consistently called for the arrest of the individuals charged in order to stop the prevailing climate of impunity in Darfur and its consequences.

3. Following the referral on 31 March 2005, and pursuant to article 15 and 53 of the Statute, the Office conducted a preliminary examination of the situation in the Sudan. It assessed whether crimes within the jurisdiction of the Court had been or were being committed and reviewed the existence of Sudanese proceedings related to the crimes. The Office's independent assessment relied in part on the conclusions of the Sudanese National Commission of Inquiry, which itself concluded that Government forces had committed crimes against humanity of murder and the war crime of wilful killing in each of the states of Darfur. However and despite many official Sudanese authorities' announcements, no judicial proceedings were conducted in relation to those crimes.

4. On 6 June 2005, upon finding that the statutory criteria were met, the Office opened an investigation.

5. The Government of Sudan (GoS) initially cooperated with the Court for a period of time. It allowed the Office to conduct 5 missions to Khartoum to meet with the Special Courts and Prosecutors in order to assess the existence of national proceedings. The Government of the Sudan also recognized the jurisdiction of the Court when it facilitated the interview of General Ismat Abdurrahman Zainelabdeen, Commander of the Sudanese Army in Darfur as a suspect and agreed to provide a Ministry of Defence report on the conflict. The Government of the Sudan's cooperation ended shortly after the Court issued its first arrest warrants.

6. The first case investigated in the Darfur situation focused on the period between March 2003 and 2004, and showed that GoS forces integrating Militia/Janjaweed under the command of the Army attacked the Fur, Masalit, and Zaghawa civilian population. The attacks followed a consistent pattern: Sudanese forces surrounded and bombed the villages targeted; troops on the ground killed, raped and pillaged the civilian population, forcing the displacement of 4 million people. On 27 April 2007, Pre-Trial Chamber I issued arrest warrants against Mr. Ahmad Harun, State Minister of Interior and responsible for the Darfur Security Desk during the relevant period, and Mr. Ali Kushayb, a militia commander for crimes against humanity and war crimes. On 1 March 2012, in relation to the same incidents, Pre-Trial Chamber I issued an arrest warrant for Mr. Abdel Raheem Muhammad Hussein, then Minister for the Interior and current Minister of Defence, for 51 counts of crimes against humanity and war crimes. At the time of the commission of the crimes, Mr. Hussein was Mr. Harun's direct superior as the Minister of Interior. When these individuals appear before the Court, the Office will seek to join the Harun and Kushayb case and the case against Hussein.

7. The second case, presented in July 2008 was based on additional evidence collected subsequently and showed that President Omar Al Bashir had planned and ordered war crimes, crimes against humanity as well as genocide in Darfur. He ordered the attacks that displaced the Fur, Masalit and Zaghawa. In accordance with a witness statement taken by the Prosecution, in March 2003, President Al Bashir directed the Armed Forces to quell the rebellion in two weeks and not to bring back any prisoners or wounded; he "didn't want any villages or prisoners, only scorched earth." The investigation also showed that systematic attacks against those millions displaced continued during the following years through rapes, illegal detentions, unlawful killings and hindering or blocking humanitarian relief. Mr. Harun also played a strategic role in the implementation of President Al Bashir's plans against

those displaced. He was appointed Minister of State for Humanitarian Affairs in September 2005 and as such he was in charge of the security and welfare of his victims. Mr. Harun was also appointed as a key member of the UNAMID oversight committee, obstructing the deployment of peacekeepers.

8. The Office consistently informed the Council in advance of the subject and timing of its future applications requesting summonses to appear or arrest warrants. In its briefing of December 2006, the Office announced its upcoming application against Harun and Kushayb; in his December 2007 and June 2008 briefings, the Prosecutor alerted the Council to his intent to present a new case against the person *"who instructs Harun and others."* The cases against rebel leaders and Minister Hussein were also delineated in advance.

9. On 4 March 2009, Pre-Trial Chamber I issued an arrest warrant for President Al Bashir for crimes against humanity and war crimes, which did not include charges of genocide. On 3 February 2010, the Appeals Chamber granted the Prosecutor's appeal and ordered the Pre-Trial Chamber to render a new decision. On 12 July 2010, the Pre-Trial Chamber issued a second arrest warrant for President Al Bashir for genocide in accordance with article 6(a) for killings, 6(b) for bodily or mental harm, including rapes, and 6(c) for imposition of conditions of life to those displaced that intended to destroy a group.

10. The Office's third case focused on the rebel attack of the African Union base in Haskanita. The investigation identified three individuals as those most responsible for crimes against AU peacekeepers. The three rebel leaders agreed to fully cooperate with the Court and voluntarily appeared before the Court. On 8 February 2010, the Pre-Trial Chamber considered that Mr Abu Garda's personal responsibility for the crimes was not proven and refused to confirm the charges against him. On 7 March 2011, the charges against the other two alleged commanders of the rebel forces, Mr Abdallah Banda and Mr Saleh Jerbo, were confirmed. A status conference to prepare the trial will be held on 11 and 12 July 2012.

11. On 25 May 2010, ICC Pre-Trial Chamber I informed the Council of the non-cooperation of Sudanese authorities with regard to outstanding ICC arrest warrants for Ahmad Muhammad Harun and Ali Kushayb. The Pre-Trial Chamber I considered that the ICC had taken *"all possible measures to ensure the cooperation of the Republic of the Sudan"* and stressed that *"the obligation of the Republic of the Sudan to cooperate with the Court stems directly from the Charter of the United Nations and Resolution 1593."*

12. Similarly, the Pre-Trial Chamber I issued findings on the non-cooperation of the Republic of Malawi and the Republic of Chad, on 12 and 13 December 2011 respectively, for their failure to comply with their obligations under the Rome Statute with respect to the arrest and surrender of President Al Bashir.

13. The cases of genocide, crimes against humanity and war crimes presented before the Court provide examples of the worst incidents within Darfur. The evidence collected uncovered the functioning of the State apparatus used to commit genocide, crimes against humanity and war crimes. After an impartial and independent assessment of the evidence, the Judges of the International Criminal Court have decided that individuals at the highest echelons of State power should be prosecuted: the President, the Minister, the State Minister and the commander on the ground. Those who bear the greatest responsibility have been indicted; the current challenge is their arrest.

II. THE ABSENCE OF DOMESTIC PROCEEDINGS

14. The Office has assessed on an ongoing basis the admissibility of its cases in Darfur. In accordance with the International Criminal Court jurisprudence, for a case to be inadmissible, there must be national proceedings *"encompassing both the person and the conduct which is the subject of the case before the court."* In accordance with article 17 of the Statute, the Office must assess the existence of national proceedings into the crimes under the jurisdiction of the Court and, if they do exist, the Office must determine whether they address in a genuine manner the specific incidents and perpetrators who bear the greatest responsibility for the most serious crimes. It is not an assessment of the Sudanese justice system as a whole.

15. On 7 June 2005, one day after the Office of the Prosecutor announced its decision to open an investigation, the GoS announced the creation of a special court, the Darfur Special Court.

16. The GoS announced the creation of the two additional Courts in November 2005. The Office conducted five missions to Khartoum and met with numerous judicial and government officials since 2005 to monitor potential national proceedings, including the work of these Special Courts.

17. These Courts have conducted no proceedings relevant to the ICC.

18. In addition to the Courts, the GoS established several *ad hoc* institutions including the Judicial Investigations Committee (JIC), the Special Prosecutions Commissions, the Committees against Rape and the Unit for Combating Crimes against Women and Children of the Ministry of Justice.

19. Further to these special investigative mechanisms, the Chief Justice of the Sudan also has the authority to refer specific charges to the Special Courts. No referrals have been made by the Chief Justice.

20. The Special Courts and the other national mechanisms created have not proceeded with any case addressing the systematic pattern of crimes committed in Darfur. The crimes committed by the ICC indictees—Ahmad Harun, Ali Kushayb, President Al Bashir, Abdel Raheem Hussein, and the Haskanita perpetrators—are not the subject of domestic proceedings in the Sudan.

21. Since Resolution 1593 (2005), the GoS has appointed at least three Special Prosecutors, each of whom has resigned without prosecuting any cases of relevance to the atrocities committed in Darfur.

22. In one instance, on 27 September 2010, Special Prosecutor for Darfur Mr. Nimr Mohamed visited North Darfur and announced his intention to begin investigations into the 2 September 2010 attack on Tabra, which resulted in a reported 37 or more people killed and 50 or more people injured. His announcement was followed by a high-level meeting on 28 September 2010 in Khartoum, involving Mr. Jalal al Din Mohammed Othman, Head of the judiciary; Mr. Ghazi Salah al Din Atabani, Presidential Advisor responsible for the Darfur portfolio; Mr. Mohammed Bishara Dossa, Minister of Justice; Mr. Abdul Raheem Mohamed Hussein, Minister of National Defence; Mr. Ibrahim Mahmoud Hamed, Minister of Interior; and Mr. Mohammad Atta al Moula, the Director General of the National Intelligence and Security Services.

23. Two weeks later, in mid-October, this Prosecutor was released from his position and replaced by Mr. Abdel Daim Zamrawi, Under-Secretary of the Ministry of Justice.

24. Obstacles to national proceedings are widely documented and include threats and torture against witnesses and other interference from the security services, as well as immunities of officials. Such obstacles were described by the African Union High-

Level Panel on Darfur, chaired by former South African President Thabo Mbeki. In October 2009, the report of the African Union High-Level Implementation Panel, adopted unanimously on 29 October 2009 at a High-Level meeting of the AU Peace and Security Council in Abuja, established that the *“current major obstacles to justice and reconciliation in Darfur”,* are the *“absence of political will; denial of what happened and is happening in Darfur, as well as obscuring of the truth; war, fear and insecurity; poor policing and enforcement of law and order; impunity for the crimes committed in Darfur; unwillingness to use the law to attend to violations of human rights; failure to reform the judiciary; and the lack of a sufficient number of qualified personnel in the judiciary.”*

25. Immunities granted to officials of the regime are an additional obstacle to any prosecution. The AU High-Level Panel noted that *“There are (...) other impediments to the effective functioning of the criminal justice system. For example, Sudan still retains legislation giving immunity to members of the police and armed forces for crimes committed in the course of their duties (...) [t]hese obstacles to justice will need to be removed.”* The 2010 National Security Act gives the NISS immunity from prosecution.

26. In January 2011, former Sudanese Minister of State for Justice, Mr. Bol Lul Wang, confirmed the GoS’s unwillingness to investigate Mr. Ali Kushayb and Mr. Ahmad Harun. According to Wang, the GoS’s inactivity has been due to the fact that the suspects hold senior political posts.

27. The current UN Panel of Experts’ report echoes the 2009 conclusions of the AU High-Level Panel on Darfur, in noting that *“There is still no effective remedy for serious human rights violations committed in Darfur. (...) The Prosecutor’s office for crimes in Darfur has not otherwise handled cases of serious human rights violations against civilians committed during the conflict, including mass killings and other atrocities.”*

28. After more than seven years of instituting several judicial mechanisms, the GoS has conducted no proceedings relevant to the crimes which come under the ICC’s jurisdiction. The issue is not the ability of the Sudanese judiciary to carry out criminal proceedings. The announcements of national efforts to investigate as well as the frequent creation of new investigative bodies have proven to be part of the policy to cover up the crimes, provide immunity for those that implement the orders of the highest rank officials, and divert international attention.

III. THE LACK OF COMPLIANCE OF THE GOVERNMENT OF THE SUDAN WITH OTHER SECURITY COUNCIL DECISIONS RELATED TO DARFUR

29. There have been many other Security Council Resolutions adopted since 2004 on the Darfur situation. From Resolution 1556, in 2004, the Council has repeatedly called on the GoS to *"mobilize the armed forces immediately to disarm the Janjaweed militias"* and has called on and *"welcomed the commitment"* of the GoS to investigate the atrocities and prosecute those responsible.

30. On 19 June 2004, President Al Bashir's order of *"a complete mobilization to disarm all illegal armed groups in the Darfur region (...) including the Janjaweed,"* was followed the day after by a statement that *"it applied only to the bandits, not to the Popular Defence Forces, Popular Police or other tribesmen armed by the state to fight the rebels."*

31. Resolution 1556 (2004) also *"[c]alls on the Government of Sudan to fulfil immediately all of the commitments it made in the 3 July 2004 Communiqué, including particularly by facilitating international relief for the humanitarian disaster by means of a moratorium on all restrictions that might hinder the provision of humanitarian assistance and access to the affected populations, by advancing independent investigation in cooperation with the United Nations of violations of human rights and international humanitarian law, by the establishment of credible security conditions for the protection of the civilian population and humanitarian actors."*

32. On 3 July 2004, President Al Bashir yet again promised through a joint communiqué with the UN to *"disarm the militias, bring the perpetrators of human rights abuses to justice, and remove any obstacles to humanitarian access."*

33. Subsequent resolutions have repeated time and again the responsibility of the GoS to lift restrictions hindering the provision of humanitarian assistance.

34. Resolution 1574 (2004) reflected on the failure to implement Resolution 1556 (2004), reiterating the problems with humanitarian access, the security environment, impunity and the failure to disarm Janjaweed leaders and bring them and others responsible to justice as well as the failure of the GoS to adhere to a ceasefire.

35. On 15 September 2007, President Al Bashir promised a ceasefire, followed three weeks later by a GoS attack that killed over 30 civilians. On 19 December 2007, he adopted a unilateral ceasefire commitment, followed within a month by aerial

bombardments. On 12 November 2008, he again pledged to commit to a ceasefire and disarm the Janjaweed, followed one week later by aerial bombardments on civilians.

36. Upon Costa Rica's initiative, on 16 June 2008, the UN Security Council adopted a Presidential Statement in which *"The Security Council recalls its decision, under Chapter VII of the United Nations Charter, in resolution 1593 (2005) that the Government of Sudan and all other parties to the conflict in Darfur shall co-operate fully...; [that] The Security Council takes note of the efforts made by the Prosecutor of the International Criminal Court to bring to justice the perpetrators of war crimes and crimes against humanity in Darfur and in particular notes the follow up by the International Criminal Court with the Government of Sudan, including the transmittal by the Registry of the International Criminal Court to the Government of Sudan on 16 June 2007 of arrest warrants...; [and that] In this respect, the Council urges the Government of Sudan and all other parties to the conflict in Darfur to cooperate fully with the Court, consistent with resolution 1593 (2005), in order to put an end to impunity for the crimes committed in Darfur."*

37. Most recently, in Resolution 2035, adopted on 17 February 2012, the Council demanded the end of military action, including aerial bombardments, demanded the end of sexual violence and indiscriminate attacks on civilians, expressed concerns on the obstacles to the work of the Panel of Experts and to that of UNAMID, called for the GoS to undertake effective efforts to ensure accountability for serious violations of international human rights and humanitarian law and to ensure unrestricted humanitarian access.

38. The Council also *"Regrets that some individuals affiliated with the Government of Sudan and armed groups in Darfur have continued to commit violence against civilians, impede the peace process, and disregard the demands of the Council."*

IV. THE CURRENT CRIMES

Deliberate inflicting of conditions of life calculated to bring about physical destruction

39. There is a judicial finding by the ICC that until July 2008, President Al Bashir's orders to attack civilians, including through aerial bombardment and through maintaining millions of persons displaced living in conditions that qualified as the crime against humanity of extermination and as genocide. The Court decision also concluded that the systematic campaign of rapes against displaced girls and women

constitutes a crime against humanity and genocide in accordance with article 6 (b).

40. There is no information to believe that such crimes against humanity and genocide against the displaced populations have stopped. On the contrary, as soon the Court issued an arrest warrant against President Al Bashir, he expelled the international organizations that were alleviating the conditions of life of the displaced in the camps. This decision confirmed the criminal intentions of President Al Bashir and the reinforced conditions directed at the destruction of a group. Instead of stopping the crimes, President Al Bashir stopped the information about the crimes. Resolution 2035 (2012) refers to *“obstacles that have been imposed on the work of the Panel of Experts during the course of its last mandate, including delays in the issuance of visas and travel permits, and restrictions to the freedom of movement of the Panel of Experts and UNAMID (...)”* Amnesty International states that *“the pattern of harassment and intimidation of critics of the government has intensified since January 2011”* all across the Sudan.

41. In order to hinder the gathering of *“reliable statistics”* on the prevalence of sexual violence in the Sudan, the GoS has either expelled or threatened with expulsion any organisations working in the area of sexual violence. There are fewer institutions helping victims of rapes. There is still no efficient way to protect them. Women are still vastly underreporting the rapes suffered. The report of the UN Panel of Experts states that *“the majority of perpetrators are unidentified ‘armed men’, followed by members of regular forces such as the CRP, SAF and police.”*

42. This is echoed in the 13 January 2012 report of the Special representative of the Secretary General on Sexual violence to this Council which however states that many victims have specifically identified the Sudanese armed forces as the perpetrators, in particular the Central Reserve Police, Sudanese Armed Forces, Government Police and *“forest guards”*.

43. Despite the efforts to conceal the situation imposed in the camps, different reports show aspects of the continuation of the crimes identified by the Judges. The current UN Panel of Experts’ report states that the GoS imposed restrictions on essential medical provision to the eastern Jebel Marra area *“includ[es] vaccines for infants under the pretext that it would fall in the hands of armed groups.”* The April 2012 Secretary-General’s Report cites humanitarian actors in Northern Darfur, reporting *“reduced delivery of health-care services because of difficulties transporting medicines to rural facilities as a result of restrictions imposed by the Government.”*

44. According to the Office for the Coordination of Humanitarian Affairs, as of March 2012, there were water shortages and inadequate health services in Nertiti IDP camp in Central Darfur and inadequate health services in Otash IDP camp in South Darfur.

45. Amnesty International reports and the UN Panel of Experts confirmed that air attacks targeting civilians continue. Arbitrary arrests in the IDP camps are reported by UNAMID and the UN Panel of Experts.

V. THE STATUS OF THE FOUR FUGITIVES

46. Ahmad Harun, indicted for war crimes and crimes against humanity, is currently Governor in South Kordofan.

47. Ali Kushayb, indicted for war crimes and crimes against humanity, is at large in the Sudan.

48. President Al Bashir indicted for war crimes, crimes against humanity and genocide, remains at large and openly defies the authority of the Council. There have been efforts to limit President Al Bashir's travel outside of the Sudan, most recently, he was invited to attend the AU summit in July 2012 in Malawi, but the President of Malawi, Joyce Banda, has raised questions about whether Malawi, a state party, could receive President Al Bashir with out arresting him. The President of Botswana Lieutenant General Seretse Ian Khama called on Malawi not to allow President Al Bashir to enter. Additionally, Zambian Foreign Affairs Minister, Chishimba Kambwili, said publicly that President Al Bashir would "regret the day he was born" if he tried to go to Zambia. However, President Al Bashir remained defiant on 13 October 2011, before a conference of the youth sector of the ruling National Congress Party, President Al Bashir bragged about the GoS breaking Security Council resolutions, insisting that *"The resolution 2003 through which they tried to fool us by amending the mandate of UNAMID will not be implemented, and we will chuck out whoever tries to do so,"* and *"they can shove the new resolutions."*

49. Mr. Abdel Raheem Hussein indicted for war crimes and crimes against humanity, is the current Minister of Defense.

50. There is information establishing that the fugitives continue to use the state apparatus to commit crimes. In footage obtained by Al Jazeera and made public on 1 April 2012, Mr Harun urged troops fighting rebels in South Kordofan to *"take no prisoners"* and said, of rebel-held territory, that *"You must hand over the place clean. Swept, rubbed, crushed. Don't bring them back alive. We have no space for them."* This language is similar to the language that Al Bashir employed, in urging GoS forces in Darfur to take no prisoners and to leave only scorched earth. The spokesperson of the GoS considered that such language only served to boost the troops' morale.

CONCLUSION

51. The role of the Council in ending impunity and preventing the commission of new crimes cannot be overstated. Whenever the Council has expressed itself forcefully, cooperation with the ICC has been forthcoming. Whenever the Council, and the international community at large, have failed to integrate the peace and justice requirements, the Government of the Sudan has rejected cooperation.

52. Following the 27 February 2007 request for issuance of summonses to appear or arrest warrants against Mr. Harun and Mr. Kushayb, the GoS formed a cabinet committee to analyze the situation, continued its contacts with the Office and had a confidential conversation exploring the consequences of Mr. Harun appearing before the Judges. The GoS subsequently decided not to cooperate with the Court.

53. With Resolution 1593 (2005), the Council took for the first time the initiative to refer a case of ongoing atrocities to a permanent, existing Court. This was a conscious decision not to wait after crimes had been committed. The Judges have established that genocide, crimes against humanity and war crimes are been committed and the President of the country and other high officials should face justice. It cannot be said that there is a lack of information.

54. Already in June 2008, after the Prosecutor's eighth briefing, the Costa Rica Minister for Foreign Affairs, Mr. Bruno Stagno Ugarte, stated to this Council: *"We cannot plead ignorance. If, through indifference or for the sake of political convenience, this Council does not make its best effort to enforce the cooperation of Khartoum with the International Criminal Court (...) in the not-too-distant future we will once again be invoking our promise of "never again". We, the civilized world, made that same promise following the Holocaust, and more recently following events in Kampuchea, Bosnia, Rwanda or Kosovo, and*

are currently putting it to the test in the Sudan.”

55. He added, “(...) [W]e refuse to believe that we, the international community, are inevitably heading towards a new “never again.” The Council knows of the evidence of the crimes committed; it knows that the guilty parties have been identified; and it knows which Government authorities protect and shelter them. All we need is for the States members of the Security Council to have the decency to muster the political will necessary to enforce the full compliance of resolution 1593 (2005) by the authorities in Khartoum. Enough appeasement — the time has passed to continue accommodating evil.”

56. The failure to arrest and surrender Mr. Harun, Mr. Kushayb, Mr. Hussein and President Al Bashir is a direct challenge to the Council’s authority. The Court has already made judicial findings of the non-compliance by the Government of the Sudan in respect of its obligations arising from the Resolution 1593 (2005). Clearly, it is for the Council to determine the proper and appropriate use of measures to ensure the compliance of the GoS.

57. The GoS has failed in its responsibility to cooperate with the Court and to arrest and surrender those individuals sought by the ICC. The obligation to ensure compliance, therefore, now falls on the collective community of States. It is for the Security Council to consider what measures can be taken to ensure execution of the arrest warrants short of military intervention. The Security Council issued Resolution 1593 (2005) under Chapter VII of the UN Charter. Until now the execution of the arrest warrants on the Sudanese territory was the primary responsibility of the GoS. The Council can assess new legal and operational possibilities for enforcing its decisions under Chapter VII in the case of the Sudan. The Office is not proposing that UNAMID be authorized to assist in the operations aimed at securing arrests. Instead, the Council can in due course evaluate other possibilities including asking UN Member States or regional organizations to execute arrest operations in furtherance of the arrest warrants issued by the International Criminal Court.