



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

14 June 2006

INTRODUCTION

The present report is submitted by the Prosecutor of the International Criminal Court pursuant to paragraph 8 of Security Council resolution 1593 (2005) and supplements the address given by the Prosecutor on the activities undertaken to implement UNSCR 1593 (2005) since the last report to the Council on 13 December 2005.

In adopting UNSCR 1593 (2005), the Council has affirmed that justice and accountability are critical to achieve lasting peace and security in Darfur. This position is reinforced in resolution 1674 (2006) which concludes that prevention of armed conflict requires a comprehensive approach and that ending impunity, through appropriate national and international mechanisms is essential to ensuring the non-recurrence of abuses.

The Prosecutor outlines in this report the progress in the investigation. In executing his responsibilities, the Prosecutor has a duty to ensure that evidence is collected and handled in a confidential manner, consistent with the Rome Statute and the Rules of Procedure, that due process is afforded to all parties to the proceedings and that particular attention is given to the responsibility of the Court to protect victims and witnesses. The assessment of the evidence will ultimately fall to the Judges of the International Criminal Court.

The swift fulfilment of the mandate of the Office of the Prosecutor (OTP) requires the full and unconditional cooperation of states and organisations, particularly the Government of the Sudan and other parties to the conflict in Darfur, as well as those organisations with significant presences on the ground such as the African Union (AU) and the United Nations (UN).

CONDUCT OF THE INVESTIGATION

The continuing insecurity in Darfur is prohibitive of effective investigations inside Darfur, particularly in light of the absence of a functioning and sustainable system for the protection of victims and witnesses. The investigative activities of the Office are therefore continuing outside Darfur. Since the last report to the UNSC, the OTP has conducted over 40 missions to more than 13 countries, collecting witness statements and other evidence, and concluded 7 new agreements and arrangements with international organisations and bodies regulating the provision of information for the investigation.

In addition, the ICC has established a temporary field presence in Chad in order to access the refugee population from Darfur currently situated in Eastern Chad. The activities of the Office were severely disrupted as a result of clashes between Chadian Government and rebel forces in April 2006. The field office was temporarily closed and staff withdrawn. Operations are expected to resume soon.

Crime Patterns

The investigation team has collated information relating to alleged crimes into a Darfur Crime Database. The analysis of this data, relating to the period October 2002 – May 2006, shows significant variations in the crime patterns reflective of the different phases of the conflict, with violence escalating between October 2002 – April 2003 and peaking during the period April 2003 – April 2005.

The Office has so far documented (from public and non-public sources) thousands of alleged direct killings of civilians by parties to the conflict. The available information indicates that these killings include a significant number of large scale massacres, with hundreds of victims in each incident. The Office has selected several of these incidents for further investigation and analysis. A large number of victims and witnesses interviewed by the OTP have reported that men perceived to be from the Fur, Massalit and Zaghawa groups were deliberately targeted. In most of the incidents where the OTP has collected evidence there are eye-witness accounts that the perpetrators made statements reinforcing the targeted nature of the attacks, such as ‘we will kill all the black’ and ‘we will drive you out of this land.’

In addition to direct killings, there is a significant amount of information indicating that thousands of civilians have died since 2003 as a consequence of the conditions of life resulting from the conflict and the ensuing displacement. These include a lack of shelter and basic necessities for survival as a result of the destruction of homes, food stocks, and the looting of property and livestock, as well as obstacles to the provision of life-saving humanitarian assistance. This type of ‘slow death’ has particularly affected the most vulnerable groups, including children, the elderly and the sick.

The Office has also registered hundreds of alleged cases of rape. This is likely to be indicative of a practice that was endemic amongst some groups involved in the conflict and in relation to which there are indications of significant under-reporting. The Office has interviewed a number of victims of alleged rapes and has commissioned further expert studies in this area. In May 2006 the OTP organised a workshop on the investigation of sexual and gender crimes,

particularly in the context of Darfur, involving experts from national criminal justice systems, as well as the other international criminal tribunals and non-governmental organisations. The meeting facilitated an exchange of experiences and the identification of best practices in dealing with sexual violence cases.

The available information also highlights a widespread pattern of displacement of civilians, with recent estimates of some two million displaced persons and refugees from Darfur. There was a significant increase in displacement between mid-2003 and mid-2005, consistent with peaks in violence (July-August 2003 and Jan-Feb 2004). The first three months of 2006 have also seen an increase in displacement in specific areas around Sheiria; Gereida; Haskanita and Jebel Marra. West Darfur appears to have by far the highest concentration of displacement, again correlating with the concentration of killings and other forms of violence in that area. There is information and evidence to suggest that the civilian population was forcibly displaced from their homes, in a widespread and systematic manner, for reasons not related to the conflict, and that those populations were denied the opportunity to return.

Destruction of property and looting is a prevalent feature of the crimes in Darfur, with reports of destruction and looting in up to 2000 villages throughout the three Darfur states. The widespread scale of this destruction is evident from the available witness statements, as well as an abundance of aerial and satellite imagery.

Religious property and symbols also appear to have been the target of attacks, with reports of the destruction of mosques (approximately 65 in West Darfur, Dar Masalit) and attacks on other places of worship. Furthermore, there is information indicating that parties to the conflict directed attacks on other non-military objectives, including attacks on medical facilities.

In addition, reports continue of direct attacks on humanitarian workers and peacekeepers, including the killing of African Union peacekeepers in 2005 and 2006. These attacks are not only grave examples of potential war crimes; they also have a direct impact on the delivery of vital services that exacerbates the suffering of the most vulnerable groups in Darfur today.

Parties to the Conflict: Identification of Individual Criminal Responsibility

The Office has gathered information and evidence of crimes alleged to have been committed by all parties to the conflict. In the current phase of the investigation the Prosecutor has identified specific cases for full investigation and possible prosecution. In making this selection, the Prosecutor is governed by the specific requirements of the Statute and Rules of Procedure and guided by objective criteria and general principles of independence, impartiality and non-discrimination. As stated in previous reports, the list of 51 names provided by the International Commission of Inquiry on Darfur remains confidential and represents the conclusions of that Commission acting pursuant to their mandate. It is not binding on the Prosecutor and is not a basis for the identification of those persons to be prosecuted by the Court.

Although any crime falling within the jurisdiction of the Court is serious, the gravity of the crimes is central to the process of case selection. The Office looks at factors such as the scale and nature of the crimes (in particular, high numbers of killings), the systematic character and impact of the crimes, as well as other aggravating factors.

In addition to the gravity of the crimes, the Office has analysed crime patterns based on perpetrating groups, geographical location of alleged crimes, as well as the accessibility of evidence. The impact of ICC investigations and prosecutions on the prevention of future crimes is also an important consideration, and particular attention will therefore be given to investigating the crimes currently affecting the lives and safety of the two million displaced civilians, in an effort to contribute to their protection from further attack and to the delivery of humanitarian aid.

The ICC has jurisdiction over crimes against humanity, war crimes and genocide. Various allegations have been made that some of the groups involved in the commission of crimes in Darfur did so with specific genocidal intent. This issue remains the subject of investigation and the Prosecutor has not, and will not, draw any conclusions as to the character of the crimes pending the completion of a full and impartial investigation.

Identifying those individuals with greatest responsibility for the most serious crimes in Darfur is a key challenge to the investigation. The complexity of the conflict in Darfur exacerbates this challenge, given that it involves multiple parties, varying over time throughout the different states and localities, which are not easily distinguished by uniform or insignia. Given the scale of the alleged crimes in Darfur, and the complexities associated with the identification of those individuals bearing greatest responsibility for the crimes, the Office currently anticipates the investigation and prosecution of a sequence of cases, rather than a single case dealing with the situation in Darfur as a whole. The selection and progress of these cases will be based on the best possible evidence available to the Office at the relevant time. As soon as the Office gathers sufficient information to meet the evidential standards in the Statute, then that information will be presented to, and assessed by, the judges at that time.

ADMISSIBILITY

In previous reports to the Security Council the OTP has referenced the various mechanisms established by the Government of the Sudan to deal with the alleged crimes in Darfur, including: the Darfur Special Court, established in June 2005; the two additional Courts created in November 2005; the ad hoc institutions to support the work of those Courts, including the Judicial Investigations Committee and the Special Prosecutions Commissions, as well as the National Commission of Inquiry, Committees against Rape and the Special and Specialised Courts of 2001 and 2003 respectively (*Annex I* provides a basic diagrammatic overview of these various mechanisms).

During this reporting period the Office has gathered significant amounts of information related to these mechanisms and carefully reviewed their activities to determine whether or not the Government of the Sudan has dealt with, or is dealing with, the cases that the Prosecutor is likely to select for prosecution.

For the purposes of this assessment, 'case' represents a specific incident in which crimes within the jurisdiction of the Court have been committed by identified perpetrators. The OTP assesses national criminal proceedings to determine whether they deal with the specific incidents and

perpetrators that the OTP, following investigation, have determined carry the greatest responsibility for the crimes.

As part of this fact-finding process, the Government of the Sudan facilitated the visit of an OTP delegation to Khartoum in February 2006 for an extensive programme of meetings with representatives of various judicial and investigative mechanisms and Government departments including the Minister of Justice, the judges of the Special Courts and the Chief Justices of each Darfur state, senior officials of the Ministry of the Interior, representatives of the prosecution services and the Judicial Investigations Committee, the Advisory Council for Human Rights, the Committee for Combating Gender-Based Violence, the National Commission of Inquiry and the Wali of South Darfur. The meetings took place in Khartoum and all meetings were formally video recorded.

Initiation and Conduct of Investigations

In assessing the conduct of national proceedings in relation to Darfur, it is instructive to note how cases are investigated and selected for prosecution. In this context, the Special Courts are primarily serviced by the *Judicial Investigations Committee* and the *Special Prosecutions Commissions*.

The Judicial Investigations Committee (JIC) was established by Presidential Order on 19 January 2005 to investigate incidents identified in the reports of the International and National Commissions of Inquiry. The JIC has focused on incidents alleged to have taken place in the areas of Buram and Kass (South Darfur); Kutum, Mallit, Tawila and El-Fasher (North Darfur); and Kulbus, Garsila/Wadi Saleh (West Darfur). According to available information, it appears that no investigations have yet been completed by the JIC and no cases have been presented to the Court as ready for trial.

The Special Prosecutions Commissions (SPC) were established by the Chief Justice of the Sudan in January 2006. There are three Commissions, with one assigned to each Darfur State (and each State Special Court), mandated to look into offences that have taken place after the work of the International and National Commissions of Inquiry. There are reports of investigations into incidents alleged to have taken place in Tama and Hamada (South Darfur) and El-Geneina (West Darfur).

The reported crimes that occurred in Hamada (January 2005) are stated to have taken place in the context of an alleged coordinated operation by Government of the Sudan armed forces and armed militias to deal with rebel elements located in the area. Available information indicates that the incident left over 100 civilians dead, more than 30 women were raped and there was widespread destruction and looting. The President of the South Darfur Special Court has indicated that the case is still under investigation, but there appears to have been limited progress in the collection of evidence and the identification of the perpetrators. He went on to highlight that the investigation faces real challenges due to the lack of access to witnesses located in rebel controlled areas.

In relation to the Tama case, there are recent reports of the acquittal of three individuals on charges of war crimes (including two members of the Border Intelligence Guard) apparently

due to a lack of evidence. These individuals were reportedly convicted of theft and sentenced to two or three year's imprisonment.

In addition to these special investigative mechanisms, the Chief Justice of the Sudan also has the authority to refer specific charges to the Special Courts. At present there is no information indicating that any referrals have been made by the Chief Justice.

Darfur Special Court

The Darfur Special Court has been presented by the Government of the Sudan as an alternative to the prosecution of cases by the International Criminal Court – invoking the complementarity framework underpinning the Rome Statute.

At the time of the establishment of the first Darfur Special Court, the President of the Court highlighted that the subject-matter jurisdiction of the Court would include crimes against humanity and war crimes and that the Court would deal with any perpetrators, regardless of rank or affiliation. Moreover, the Government of the Sudan announced that approximately 160 suspects had been identified for investigation and possible prosecution: 92 from South Darfur, 38 from North Darfur and 32 from West Darfur.

With regard to the work of the first Darfur Special Court, there are no significant changes since the last report of the Prosecutor to the Security Council. So far the Special Court has conducted 6 trials of less than thirty suspects. The cases include 4 incidents of armed robbery, 1 incident of receipt of stolen goods, 2 cases of possession of firearms without a licence, 1 case of intentional wounding, 2 cases of murder and 1 case of rape. Eighteen of the defendants were low-ranking military officials (including 8 members of the Popular Defence Forces); the remainder appear to be civilians. The President of the Special Court has stated that no cases involving serious violations of international humanitarian law were ready for trial and that the six cases selected were in fact chosen from the case files lying before the ordinary Courts.

Other Mechanisms

National Commission of Inquiry: The NCOI was established by the President of the Sudan in May 2004 to investigate human rights violations by armed groups in Darfur. The Commission made significant efforts and is reported to have met over sixty-five times and listened to two hundred and twenty eight witnesses, including during a number of visits to Darfur. The Commission recommended further investigations into incidents in Deleig (West Darfur); Tanako, Kass and Buram (South Darfur) and Meleit and Kelebs (North Darfur).

Ad Hoc Committees: Various ad hoc committees have been established in the three Darfur States following from the recommendations of the NCOI. The Governor of South Darfur is reported to have been particularly active in establishing committees to look at incidents in Hamada, Buram, Khor Abeche, Marla and Labado.

Committees against Rape: The Committees against Rape were established by decree of the Minister of Justice in July 2004. No specific investigations or cases have been brought by the Committee so far in relation to allegations of sexual violence in Darfur.

Unit for Combating Crimes against Women: The Unit for Combating Crimes against Women was established by the Minister of Justice in February 2006. Its mandate is prospective with a view to implementing an action plan for eliminating violence against women which is a Sudan wide plan, with Darfur as an immediate focus. This unit, whilst a positive step, is not involved in the investigation or prosecution of alleged crimes as such for the purposes of admissibility.

Tribal Reconciliation

The Government of the Sudan has provided the OTP with a significant amount of information relating to the conduct of traditional reconciliation mechanisms in Darfur as a way of resolving conflicts between tribes. Various tribal meetings are reported to have taken place in Darfur, including Mellit, Shearia and Abata. Such processes are also given a formal role in the context of the Darfur Peace Agreement, with the establishment of a Tribal Reconciliation Committee and the proposed Darfur-Darfur Dialogue. These processes are not criminal proceedings as such for purposes of assessing the admissibility of cases before the ICC, but they are an important part of the fabric of reconciliation for Darfur.

Admissibility Assessment

In previous reports the OTP has highlighted the fact that the admissibility assessment is a *case specific* assessment and not a judgment on the Sudan justice system as a whole. Once the Prosecutor has identified the cases he intends to take forward for prosecution, he must examine whether or not the national authorities are conducting or have conducted genuine national proceedings in relation to those cases.

It is clear that the national authorities face significant challenges to the conduct of effective criminal proceedings in Darfur, particularly in light of the fact that the conflict has destroyed or dislocated the normal criminal justice infrastructure. For example, in North Darfur, as of mid-2005, many members of the judiciary and prosecution service were relocated to El-Fasher leaving most of the State unattended. In the six localities in West Darfur, only three had sporadic prosecution services between 2002 and 2005. Most of the staff were based out of El-Geneina, with restrictive travel due to the security conditions. In South Darfur the conflict displaced many of the twenty seven judges and severely limited the number of cases investigated and brought before the Court.

The Native Courts were also heavily undermined. Whilst these courts focus on civil disputes, they form a part of the infrastructure for peaceful settlement of disputes between farmers and herders in Darfur. In West Darfur there are reports that five heads of the rural Courts were assassinated. In South Darfur a limited number of the ninety three Courts are functioning reportedly due to a lack of security.

The Special Courts appear to remain relatively inaccessible, with judges performing other duties in Khartoum, awaiting the start of trials in Darfur. Limited resources and specialised expertise with reliance on existing infrastructure for investigations is also hampering progress. Some efforts have been made by the Government of the Sudan to rectify these deficiencies, including deployment of forensic teams (May 2005), but these efforts have also reportedly been restricted by the lack of security on the ground.

Many of the investigation mechanisms are reactive to complaints, but there is a reluctance or inability on the part of witnesses and victims to come forward with complaints and in some cases there are allegations of intimidation and harassment of complainants. This is particularly prevalent in the context of rape allegations. The lack of any system for protection of witnesses is also a strong disincentive to complainants and presents a serious obstacle to the conduct of any effective national criminal proceedings.

Conclusion

Based upon the current OTP assessments, it does not appear that the national authorities have investigated or prosecuted, or are investigating and prosecuting, cases that are or will be the focus of OTP attention such as to render those cases inadmissible before the ICC. The Office reinforces the point made in previous reports, that this assessment is on-going and a final determination will be made following a full investigation of the specific cases that are selected for prosecution. This will require the continued cooperation of the Government of the Sudan in providing access to proceedings, to officials and institutions, including in Darfur, and to relevant documentation.

INTERESTS OF JUSTICE

The Prosecutor continues to gather information from various organisations and individuals relevant to the Article 53(2)(c) assessment of the interests of justice. In making this assessment the Prosecutor will explore ways to collect, and take into account, the views of the witnesses and victims of the crimes in a systematic and comprehensive manner.

COOPERATION

Progress in the investigations and prosecution of crimes in Darfur rests in particular on the cooperation that the ICC receives from the Government of the Sudan, the African Union, the United Nations and other organisations with a significant presence in the region. The Security Council has foreseen this in resolution 1593 (2005).

Paragraph 2 of UNSCR 1593 (2005) requires the Government of the Sudan and all other parties to the conflict in Darfur to cooperate fully with, and provide necessary assistance to, the Court and the Prosecutor. Other states and organisations are also urged to cooperate fully.

Paragraph 3 of UNSCR 1593 (2005) invites the Court and the African Union to discuss practical arrangements for facilitating the work of the Prosecutor and the Court, including the possibility of conducting proceedings in the region.

African Union

Previous reports by the Prosecutor to the Security Council have highlighted the slow progress in the cooperation between the OTP and the African Union Mission in the Sudan (AMIS).

Since December 2005, the Office has engaged on a number of occasions with AMIS and the African Union seeking to expedite cooperation. Representatives of the OTP met with AMIS in Khartoum in February and delivered a detailed request for information relevant to the investigation. The Prosecutor has also offered to brief the AU Peace and Security Council (PSC)

on the activities of the Office in Darfur and on the importance of the relationship between the ICC and the AU in reinforcing mutual efforts to ensure justice and accountability.

The Prosecutor welcomes the recent statement of the AU Peace and Security Council in its communiqué of 10 March 2006 supporting cooperation between the AU and the Court in Darfur. The Prosecutor has also received confirmation in writing by Ambassador Konare (AU Commission Chairperson) and Ambassador Kingibe (AMIS Special Representative and Head of Mission) of the commitment of the AU to fully cooperate with the ICC and the determination of the AU to assist in the fight against impunity. In addition, it is anticipated that the Prosecutor will brief the AU PSC in the near future on progress in the context of UNSCR 1593.

These are signals that cooperation will now be forthcoming, but it is important to reiterate that the expeditious assistance of the African Union remains a fundamental component to progress in key aspects of the investigation.

Other States and Organisations

The Office has been closely following the discussions in the Security Council on the distribution of responsibilities between AMIS and a possible future UNSC mandated mission. It is important that all parties to these discussions take into account the need for a clear basis for cooperation with the ICC, in the implementation of UNSCR 1593 (2005), particularly in the context of providing a system for the protection of witness and victims. The cooperation and assistance of the AU and the UN will be essential to any future operations in Darfur, the absence of which will be a real impediment to rapid progress in the investigation.

In March 2006 the OTP concluded an exchange of letters with the Panel of Experts established pursuant to UNSCR 1591 (2005). The exchange of letters grants the Panel access to the information gathered by the Commission of Inquiry, but does not include the list of 51 names that was annexed to the International Commission of Inquiry report. That list remains confidential in the possession of the Prosecutor.

The Prosecutor notes the developments in the work of the UN Sanctions Committee and the listing of individuals for the purposes of sanctions and is closely following the work of these bodies. This list of individuals is in no way connected to the process of identification of individuals for possible prosecution by the ICC. It is important to reinforce the fact that the mandate and activities of the Sanctions Committee and the ICC are distinct and that the work of the ICC is governed by specific evidentiary standards and specific rules of procedure and evidence.

Government of the Sudan

In December 2005 the OTP reported to the Security Council on a series of cooperation requests that had been made to the Government of the Sudan. These included a visit to the Sudan to assess national proceedings relating to Darfur, and the delivery of a written report on matters identified by the Prosecutor to the Sudanese authorities in preparation for the conduct of interviews of officials who due to their positions could provide information relating to the activities of the Government of the Sudan and other parties to the conflict in Darfur.

In response to the first request related to national proceedings, a delegation of the OTP visited the Sudan in February 2006 for an extensive programme of meetings with judges, prosecutors, representatives from the police force and other government departments (a detailed description of the visit and the findings is set out above in the section on Admissibility). The Government of the Sudan cooperated with the Office in allowing unfettered access to the requested officials in meetings that were formally video recorded. In addition to the officials requested by the OTP, the Government facilitated meetings with the Governor of South Darfur and with representatives of the commission demarcating nomadic routes, offering further information on the situation in Darfur. The Government also facilitated a visit by the OTP to Juba, Southern Sudan, in order to meet with officials to discuss the situation relating to the Lord's Resistance Army and efforts to apprehend the five LRA commanders identified in ICC arrest warrants issued in 2005.

At the start of May 2006 the Government of the Sudan provided the OTP with a written report responding to questions submitted by the Prosecutor in February 2006. This report provides information on the various phases of the conflict from the Government's perspective, on matters relating to the military and security structures operating in Darfur, the activities of other parties to the conflict and the legal system governing the conduct of military operations. The written report was supplemented by a meeting between representatives of the OTP and military officers that took place in Khartoum in June 2006. The OTP has sought access to specified underlying data and may make further requests for more detailed information relating to the report.

This report was submitted in preparation of the above mentioned interviews, which are extremely important to establish a comprehensive and complete account of the events in Darfur since 1 July 2002. To date the Office has collected information and evidence from outside the Sudan. However, a complete picture of the events requires information and evidence from all parties involved in the conflict to fully test and corroborate the numerous accounts and allegations of crimes. These interviews have not yet taken place. However, the Government of the Sudan recently agreed that the interviews will start in August 2006.

CONCLUSION

The ICC is a complementary international mechanism to deliver justice for the most serious international crimes. The concern of the ICC is to see effective justice for the victims of the crimes in Darfur. This can be achieved either at a national level, where the domestic authorities are genuinely willing and able to prosecute those most responsible for the most serious cases, or by the ICC.

In the coming phase the Office will seek to complete the investigation of those individuals with greatest responsibility for the most serious crimes, including those crimes exacerbating the suffering of the displaced people today, and will assess admissibility of cases. The achievement of these objectives in an expeditious manner requires the full support of the Security Council and the unfettered cooperation of the international community, in particular the Government of the Sudan and all parties to the conflict, the African Union and the United Nations.

ANNEX I

