

**Cour
Pénale
Internationale**

**International
Criminal
Court**

**REPORT OF THE PROSECUTOR OF THE
INTERNATIONAL CRIMINAL COURT,
MR. LUIS MORENO OCAMPO,
TO THE SECURITY COUNCIL
PURSUANT TO UNSCR 1593 (2005)**

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I. INTRODUCTION

On 31 March 2005 the United Nations Security Council adopted Resolution 1593 (2005) (UNSCR 1593 (2005)) referring the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court.

Paragraph 8 of the Resolution invites the Prosecutor to address the Council within three months of the date of adoption, and every six months thereafter. The first such meeting between the Prosecutor and the Council is to take place on 29 June 2005. This report supplements the address to be given by the Prosecutor, providing further details on the activities of the ICC undertaken to implement UNSCR 1593 (2005) and to highlight areas of support required to facilitate this work.

II. PRELIMINARY ANALYSIS AND INITIATION OF THE INVESTIGATION

1. Gathering of Information and Analysis

Prior to the commencement of a formal investigation, the Prosecutor is required to gather and assess relevant information in order to determine whether there is a reasonable basis to initiate an investigation.¹ The Prosecutor makes this determination following consideration of the three factors set out in article 53(1) of the Statute, namely whether:

- a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;
- b) The case is or would be admissible under article 17, and
- c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.

Following the adoption of UNSCR 1593 (2005) the Office of the Prosecutor (OTP) immediately initiated an extensive process of information gathering and analysis to fulfil this statutory obligation. This was carried out by a multi-disciplinary joint team comprising staff from the three divisions of the OTP: the

¹ For an explanation of the process of preliminary analysis see the Annex to the "Paper on some policy issues before the Office of the Prosecutor": Referrals and Communications (available at the ICC website: <http://www.icc-cpi.int/>).

Jurisdiction, Complementarity and Cooperation Division (JCCD), the Investigation Division (ID) and the Prosecution Division (PD).

On 5 April 2005 the OTP received more than 2,500 items, including documentation, video footage and interview transcripts that had been gathered by the International Commission of Inquiry on Darfur. In parallel, the Prosecutor collected a sealed envelope from the UN Secretary General containing the conclusions reached by the Commission as to persons potentially bearing criminal responsibility for the crimes in Darfur. In order to ensure that the contents of this envelope remained confidential, the Prosecutor opened and re-sealed the envelope in the presence of the two deputy prosecutors and the head of JCCD. The Prosecutor does not consider this list of names to be binding; rather they represent the conclusions of the Commission. The OTP will conduct its own independent investigations, in accordance with the Rome Statute and the policies of the Office, in order to determine those persons bearing greatest responsibility for the crimes to be prosecuted by the Court.

In addition to this material, the OTP has collected more than 3000 documents from a variety of other sources, has been in contact with more than 100 groups and individuals and has interviewed more than 50 individuals with specific expertise of the situation in Darfur. Statements were taken at the seat of the Court, in accordance with the Statute and Rules of Procedure and Evidence.

Having collected this information, the OTP has indexed, and critically evaluated the data and its reliability. Reports and briefings have been provided to the Prosecutor in order to inform his decision-making for the purposes of article 53(1) of the Statute. An insight into aspects of this analysis is outlined in further detail below.

1.1. Crimes within the Jurisdiction of the Court

A crime database has been created to store, collate and analyse information on the alleged crimes. This database, amongst other tools, assists in the identification and analysis of crime patterns and victim profiles, as well as the assessment of the gravity of the crimes.

There is a significant amount of credible information disclosing the commission of grave crimes within the jurisdiction of the Court having taken place in Darfur. These crimes include the killing of thousands of civilians and the widespread destruction and looting of villages, leading to the displacement of approximately 1.9 million civilians. The conditions of life resulting from this violence have led to the deaths of tens of thousands from disease and starvation, particularly affecting vulnerable groups such as children, the sick and the elderly. Information also suggests a pervasive pattern of rape and sexual violence taking place throughout Darfur, including allegations of gang rape, as well as attacks on children and young girls.

In addition, the OTP has received information showing the persistent targeting and intimidation of humanitarian personnel. The gravity of such attacks is heightened by their over-all impact on the delivery of vital humanitarian aid to over two million individuals living in an already extremely vulnerable situation.

The jurisdiction of the Court covers the situation in Darfur since 1 July 2002. This jurisdiction remains open and the further commission of grave crimes will be the subject of on-going monitoring, investigation and potential prosecution by the ICC.

1.2. Admissibility

In accordance with the Rome Statute, the ICC is complementary to national criminal jurisdictions. This means that the ICC is a last resort Court which will only intervene where: 1) there is not or has not been any national investigation or prosecution of the cases; or 2) where there is or has been an investigation or prosecution, but they are vitiated by an unwillingness or inability to genuinely carry out the investigation or prosecution.²

In light of the complementarity regime and article 53(1)(b) of the Statute, the Prosecutor is required to consider whether there could be cases that would be admissible within the situation in Darfur since 1 July 2002. In making this assessment, the Prosecutor takes into account the nature of the alleged crimes, as well as information relating to those who may bear the greatest responsibility for such crimes.

For the purpose of analysing the admissibility of cases, the OTP has studied the Sudanese institutions, laws and procedures. In this context, the Government of Sudan has provided information relating to the Sudanese justice system, the administration of criminal justice in various parts of Darfur, traditional systems for alternative dispute resolution, and has furnished copies of materials relevant to the report of the National Commission of Inquiry.

² In accordance with article 17 of the Statute in order to determine “unwillingness” in a particular case, the Court shall consider whether one or more of the following exist:

- a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility
- b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
- c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

In order to determine ‘inability’ in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

The Office has also interviewed more than a dozen individuals and sought information on national proceedings that may have been undertaken in relation to crimes within the jurisdiction of the Court allegedly committed in Darfur, including mechanisms provided to allow individuals to report crimes and have access to justice. The Office has also gathered information regarding multiple ad hoc mechanisms that have been created by the Sudanese authorities in the context of the conflict in Darfur, such as the Committees against Rape established by a Ministerial order in 2004, the Special Courts created under the Special Courts Act in 2004, the Specialized Courts that replaced them, pursuant to a decree issued by the Chief Justice also in 2004, as well as the National Commission of Inquiry and other ad hoc judicial and non judicial committees.

In light of the information reviewed, the Prosecutor determined, on 1 June 2005, the existence of sufficient information to believe that there are cases that would be admissible in relation to the Darfur situation. It is important to emphasise that this decision does not represent a determination on the Sudanese legal system as such, but is essentially a result of the absence of criminal proceedings relating to the cases on which the OTP is likely to focus.

The admissibility assessment is an on-going assessment that relates to the specific cases to be prosecuted by the Court. Once investigations have been carried out, and specific cases selected, the OTP will assess whether or not those cases are being, or have been, the subject of genuine national investigations or prosecutions. In making this assessment, the OTP will respect any independent and impartial proceedings that meet the standards required by the Rome Statute.

In mid-June 2005, after the decision by the Prosecutor to start an investigation, the Government of Sudan provided the OTP with information relating to the establishment of a new specialised tribunal to deal with some individuals considered to have been responsible for crimes committed in Darfur.³ As part of the on-going admissibility assessment the OTP will follow the work of the tribunal in order to determine whether it is investigating, or has investigated or prosecuted, the cases of relevance to the ICC, and whether any such proceedings meet the standards of genuineness as defined by article 17 of the Rome Statute.

1.3. Interests of Justice

In referring the situation in Darfur to the ICC the UN Security Council has highlighted both the gravity of the situation as well as the vital role that the delivery of independent and impartial justice will play in combating the sense of impunity persisting in Darfur and preventing the commission of further crimes.

³ The Specialised Tribunal for Darfur was established by decree no. 702, issued by Chief Justice Jalal-el-Din Mohamed Osman, pursuant to Article 10 of the Judicial Council Act of 1986 and Article 6 and 14 of the Criminal Procedure Act of 1991.

When assessing issues relevant to the interests of justice and of the victims the Prosecutor has carefully considered the over-all context in which investigations will take place and has gathered information from various sources on efforts to restore peace and security to Darfur. As required by the Statute, the Prosecutor has determined that, at the time of initiating the investigation, there were no substantial reasons to believe that the investigation would not serve the interests of justice. The OTP will monitor and remain sensitive to developments in this context.

2. Decision to initiate an Investigation

Having carried out this preliminary analysis, on 1 June 2005 the Prosecutor determined that there is a reasonable basis to initiate an investigation into the situation in Darfur since 1 July 2002. On 6 June 2005, following the notification of the Chambers and Presidency, the OTP issued a press release noting this decision. This determination opens the way to the full exercise of the Prosecutor's investigative powers under the Statute.

III. COOPERATION

Paragraph 2 of UNSCR 1593 (2005) requires the Government of 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.

1. The Government of Sudan and other Parties to the Conflict

Specific requests for assistance were not issued to the Government of Sudan or other parties to the conflict during the preliminary analysis phase. However, since the referral the Prosecutor has held two meetings (in April and May) in The Netherlands with officials of the Government of Sudan. These meetings were exploratory in nature, involving discussions relating to the situation in Darfur, ICC procedures and the general policies and strategies of the OTP. The Government of Sudan has provided to the Office information relating to the Sudanese legal system, as well as information relating to traditional processes for reconciliation relevant to Darfur. This information has been carefully analysed as part of the process of preliminary analysis outlined above.

In addition, the OTP has held exploratory meetings with other parties to the conflict in Darfur in order to establish channels for communication and cooperation.

The initiation of the investigation marks the start of a new phase in the proceedings that will require specific, full and unfettered cooperation of the Government of Sudan and other parties in the conflict. The OTP will keep the Security Council informed of progress in this regard.

2. Cooperation with other States

Paragraph 2 of UNSCR 1593 (2005) also urges all States to cooperate fully with the Prosecutor and the Court. Insofar as States Parties to the ICC are concerned, the Statute provides an existing framework of obligations and modalities, which the OTP has supplemented through various agreements and arrangements.

The Prosecutor has also met with representatives from various States Parties and non-States Parties to discuss the situation in Darfur and to brief them on the procedures, policies and strategies relevant to the activities of the Office of the Prosecutor. These meetings included a visit to Cairo to meet with HE Ahmed Abul-Gheit, Minister of Foreign Affairs of the Republic of Egypt, as well as other representatives of the Egyptian Government. The Egyptian Government emphasised its support to the ICC and the Government of Sudan in ensuring justice in relation to the crimes committed in Darfur.

The support and cooperation of States Parties and non-States Parties to the ICC will be important to ensure the effective implementation of UNSCR 1593 (2005). As the investigation progresses the OTP may make requests to relevant states for cooperation and assistance in the process of evidence gathering. Moreover, efforts to promote the rule of law and meaningful reconciliation, complementing the work of the Court, will require the full engagement of the Government of Sudan, African States and other States from the region.

3. The African Union

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.

A strong relationship between the Court and the African Union is critical not merely due to the leading role played by the AU in seeking peace and security in Darfur, but also in order to ensure that the contribution made by the ICC is made more meaningful through close partnership with African countries.

In 2004 the ICC started negotiations of a relationship agreement with the African Union. In April 2005, following the referral of the situation in Darfur, OTP and the Registry, headed by Deputy Prosecutor Fatou Bensouda, undertook a joint mission to Addis Ababa with a view to finalizing the terms of the agreement. This agreement will provide a framework and modalities for future cooperation between the AU and the ICC, including with regard to Darfur, as well as other situations of mutual concern. Negotiations successfully ended in an agreed text which the Court hopes will be signed soon. During the joint mission the ICC delegation also met with other officials of the AU, including in particular the Head of AMIS.

On 20 May 2005 the Prosecutor met with HE President Obasanjo, in his capacity as President of the Republic of Nigeria and President of the African Union. The meeting focused on the importance of building the relationship between the AU and the ICC, as well as the current situation in Darfur. It was also discussed that the role of the ICC in investigating and prosecuting persons most responsible for crimes in Darfur, should be complemented by support for other national and traditional mechanisms for justice and reconciliation, as reflected in UNSCR 1593 (2005).

Strengthening the relationship between the AU and the ICC will be a key task during the next phase in order to facilitate the expeditious conduct of investigations.

4. Cooperation with other Organisations

The OTP has concluded, and is in the process of concluding, necessary agreements and arrangements with various other organisations on the modalities of cooperation and the provision of information. In some cases these arrangements pre-dated the referral, for example the UN Relationship Agreement concluded between the Court and the UN in October 2004, which provides an existing framework for cooperation between the UN and the Court. In addition, the OTP has developed contacts with other organisations, such as the Arab League, which are playing a role in seeking an end to the conflict in Darfur.

IV. PREPARATION AND PLANNING OF THE INVESTIGATION

The ICC received the referral of the situation in Darfur into a well developed institution, including court-rooms, staffing structures, protocols and policies. The Court currently comprises 99 States Parties from all regions of the world and 311 staff members from 57 countries, reflecting its international character. This existing framework has allowed the Court to react quickly to the referral and to make significant advancements in planning for future investigations and prosecutions. The 2005 core budget for the Court already envisages the conduct of a third investigation, although additional resources for certain areas of the Court's activities may be required as the process progresses. In this context, the ICC has already received voluntary contributions from the Government of Canada, as well as indications from others that voluntary contributions may be forthcoming to assist in activities relating to Darfur.

While respecting the independence of the Office of the Prosecutor and the judiciary, the different organs of the Court coordinate with and seek the concurrence of each other on administrative matters of mutual concern. This administrative coordination is achieved through the Coordination Council, comprised of the President on behalf of the Presidency, the Prosecutor, and the Registrar. The Coordination Council is mandated to discuss and coordinate on the administrative activities of the organs of the Court. Subsequent to the referral by the Security Council of the situation in Darfur, the Coordination Council has met to

discuss the relevant administrative implications of the referral. The Coordination Council will continue to discuss and coordinate on administrative activities pertaining to the referral.

Under the Rome Statute, the judiciary consists of three divisions: Pre-Trial, Trial, and Appeals. The Chambers of the Pre-Trial Division are responsible for judicial matters arising before the trial phase commences. The Presidency, which is composed of three judges elected by their peers, is responsible for constituting the Pre-Trial Chambers and for assigning situations to the different Chambers. There are currently three Pre-Trial Chambers, constituted by the Presidency in its decision of 23 June 2004.

Once a situation has been referred to the Prosecutor, he is under an obligation to inform the Presidency which will then assign the situation to a Pre-Trial Chamber. The Prosecutor formally notified the President of the referral by the Security Council of the situation in Darfur by a letter of 4 April 2005. The Presidency subsequently assigned the situation in Darfur to Pre-Trial Chamber I in its decision of 21 April 2005.

Planning and preparations for investigations relating to Darfur are also advancing rapidly. Within the OTP, a multi-disciplinary joint team has been convened, comprising staff from each of the three divisions within the Office. Recruitment of additional personnel for all three divisions, on a fixed and project specific basis, is also well underway. The investigation team will be at full capacity by the end of July 2005. Persons with relevant language expertise have been identified and recruited and the translation of key documentation and potential evidence is underway.

Detailed analysis and planning has been given by the joint team to case theories, evidence collection plans, and legal strategies. Given the wealth of available information, planning in this area is already at an advanced stage. The Office has applied the experiences gained in relation to the on-going investigations in the DRC and Northern Uganda and benefited from the lessons of the ad hoc international tribunals. Key analytical and research tools have been developed for the investigation in Darfur, including a crime database, a case matrix and crime mapping tools. Potential sources for forensic evidence and strategies for the gathering and preservation of such materials have also been identified.

The protection of victims and witnesses is a major challenge in any conflict situation and it is a core responsibility shared by OTP and the Registry, in particular its Victims and Witness Unit. Information gathering is underway to inform the security risks that may face witnesses, other information providers and ICC staff in the course of the investigation. Protection protocols and guidelines have also been developed to deal specifically with the Darfur situation, taking into account the experiences of the ICC in the DRC and Northern Uganda. The information currently available highlights the significant security risks facing civilians, local and international humanitarian personnel in Darfur. These issues will present persistent challenges for the investigation.

In addition to the management of witnesses, the investigation will involve gathering and marshalling significant amounts of documentary evidence. The ICC has developed a physical infrastructure to manage this process, ensuring strict adherence to chain of custody requirements and accessibility for investigators and analysts through customised IT systems. Protocols and systems have also been developed to handle disclosure obligations and the investigation of exonerating circumstances, as well as the storage and use of information from sensitive sources. It is vital that, where possible, relevant individuals and groups take all available steps to preserve information and materials that may form part of the evidence in future proceedings.

Communication of the ICC's activities will be essential to ensuring understanding of, and participation in, the process, particularly by affected communities and regional groups and organisations. This is a shared task between the OTP and Registry and activities are underway to identify and develop networks of organisations and media outlets, particularly those located within the region. The Court will take all possible steps to bring the proceedings closer to those affected by the crimes, this may include the establishment of ICC presences within the region. In addition, the Court may, pursuant to the Rome Statute, consider the conduct of proceedings at places other than the seat of the Court.

The activities outlined above have laid the foundation for the expeditious conduct of investigations and proceedings before the Court.

V. OBSERVATIONS: NEXT STEPS

The start of formal investigations in relation to crimes in Darfur brings into effect the Prosecutor's full investigative powers. In the coming weeks and months the OTP will select specific crimes for investigation, identify those persons bearing greatest responsibility for those crimes and assess the admissibility of the selected cases. The Office will work expeditiously to these ends, in a manner sensitive to the over-all situation in Sudan and the interests of the victims.

In carrying out this work, the Office will request the assistance and cooperation of the Government of Sudan and all other parties to the conflict in Darfur. The assistance and cooperation of other states, inter-governmental and non-governmental organisations will also be sought. The language of UNSCR 1593 (2005) must be converted into a reality as soon as possible and the rapid delivery of full cooperation and support will be essential to make this happen. Continued reporting to and engagement of the UN Security Council on these matters will be vital.

The focus of the OTP is not just retrospective to those crimes committed from 1 July 2002, we are also vigilant to the on-going commission of serious crimes in Darfur and the devastating impact they have on the civilian population. The Office will closely monitor these on-going crimes and investigate and prosecute persons responsible for their commission. The commencement of investigations marks an opportunity for all parties to take all possible steps to prevent the continuation of such offences.

The referral of the situation in Darfur to the Office of the Prosecutor has brought an international, independent and impartial justice component to the efforts to end the violence in Darfur. This component forms part of a collective international and regional effort to improve the security situation, ensure the provision of humanitarian assistance and the creation of conditions for the return of refugees and internally displaced persons. A priority for the Office will be to work with the African Union, states and civil society in the region to encourage and support these efforts. To facilitate this approach the Court will seek to establish appropriate presences and effective communications in the region.

In line with the existing policies of the Office, the OTP's strategy in relation to Darfur will be twin-tracked. The Office will conduct focused investigations and prosecutions of those individuals who bear the greatest responsibility for the crimes in Darfur. In selecting these individuals, the OTP will rigorously examine evidence of direct and indirect perpetration of crimes, conscious of the high evidential threshold for criminal responsibility imposed by the Rome Statute.

Additional international and national efforts will be required to bring to justice other offenders and to promote the rule of law and reconciliation through traditional and other mechanisms. This has particular significance in the context of Darfur where, as in other areas of Africa, tribal and traditional systems exist for the promotion of dispute resolution. The ICC will cooperate with and support such efforts, the combination of which will mark a comprehensive response to the need for peace, justice and reconciliation.