



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

INTRODUCTION

1. This is the twenty-third report submitted to the United Nations Security Council (the “Council”) by the Prosecutor of the International Criminal Court (the “Prosecutor” or the “Office”) pursuant to paragraph 8 of the United Nations Security Council Resolution 1593, dated 31 March 2005 (“UNSCR 1593”). This report provides updates on the judicial activities since the Office’s last report to the Council on 15 December 2015, including with respect to on-going investigations and the failure of the Republic of Sudan to cooperate with the International Criminal Court (the “Court” or the “ICC”) and refusal to comply with UNSCR 1593. The Report also highlights the activities of the Office in monitoring crimes in Darfur.
2. The Council will recall that the Court exercises its jurisdiction in relation to the situation in Darfur in accordance with article 13(b) of the Rome Statute and UNSCR 1593, through which the Council referred the situation in Darfur to the Prosecutor of the Court. As the Office has reported to the Council on numerous occasions in the past, four persons against whom arrests warrants were issued, namely Messrs Ahmad Muhammad Harun, Ali Muhammad Ali Abd-Al-Rahman, Omar Hassan Ahmad Al Bashir, and Abdel Raheem Muhammad Hussein, remain at large in Sudan and continue to occupy high-ranking positions within the Government of Sudan (“GoS”). Additionally, Mr Abdallah Banda Abakaer Nourain, against whom an arrest warrant was issued on 11 September 2014, also remains at large in Sudan. The Office reiterates that the GoS is under an obligation to immediately arrest and surrender all of these individuals to the Court. It is the responsibility of this Council to ensure that the GoS complies with its obligation to arrest and surrender the five individuals to the Court without further delay and to take necessary action to ensure that compliance.
3. In UNSCR 2265, the Council expressed deep concern at the increased violence and insecurity in Darfur; noted the significant increase in the number of internally displaced persons since 2014 and the restriction of humanitarian access to conflict areas where vulnerable civilian populations reside, and called on all armed actors to refrain from all acts of violence against civilians, emphasising that some of these acts may amount to war crimes or crimes against humanity.

Ensuring the arrest and surrender of the five individuals against whom ICC arrest warrants have been issued will potentially reduce the increased violence and insecurity in Darfur.

1. RECENT JUDICIAL ACTIVITIES

4. Litigation regarding Mr Al Bashir's attendance at the African Union Summit in South Africa in mid-June 2015 is continuing in the South African courts. As indicated in the previous Report, on 15 October 2015, Pre-Trial Chamber II ("PTC II") granted South Africa's request for an extension of the time-limit to submit its views until such time as the on-going relevant judicial proceedings before the South Africa courts are finalised. PTC II further ordered South Africa to report to it any developments in the relevant domestic judicial proceedings as they occur, and that should no such developments occur prior to 15 December 2015, South Africa should submit a report detailing the status of the relevant domestic judicial proceedings no later than 31 December 2015.
5. On 24 December 2015, South Africa informed PTC II that its "Application for Leave to Appeal: Minister of Justice and Constitutional Development and Eleven Others v Southern African Litigation Centre" was to be heard on 13 February 2016. On 15 March 2016, the Supreme Court of Appeal of South Africa rendered its Judgement in the case no: 867/15, (15 March 2016). The main findings underscored South Africa's obligations under the Rome Statute. In sum, the Supreme Court of Appeal found that: (i) Mr Al Bashir was not entitled to immunity under the hosting agreement between South Africa and the African Union, nor did the ministerial proclamation under section 5(3) of Diplomatic Immunities and Privileges Act 37 of 2001 (DIPA) confer immunity on him; (ii) ordinarily, "*President Al Bashir would have enjoyed inviolability under customary international law when visiting South Africa last June*"(para.85); however, (iii) "*when South Africa decided to implement its obligations under the Rome Statute by passing the Implementation Act it did so on the basis that all forms of immunity, including head of state immunity, would not constitute a bar to the prosecution of international crimes in this country or to South Africa cooperating with the ICC by way of arrest and surrender of persons charged with such crimes before the ICC, where an arrest warrant had been issued and a request for cooperation made*"(para.103). In relation to the earlier discussion of head of state immunity, the Supreme Court of Appeal Judge continued: "*if that puts this country in the vanguard of attempts to prevent international crimes, and when they occur, cause the perpetrators to be prosecuted, that seems to me a matter for national pride rather than concern*" (para.103).
6. In conclusion, the Supreme Court of Appeal of South Africa varied the previous declaration of the High Court on South Africa's Rome Statute obligation and held: "*[T]he conduct of the Respondents in failing to take steps to arrest and detain, for surrender to the International Criminal Court, the President of Sudan, Omar Hassan Ahmad Al Bashir, after his arrival in South Africa on 13 June 2015 to attend the 25th Assembly of the African Union, was inconsistent with South Africa's obligations in terms of the Rome Statute and section 10 of the Implementation of the Rome Statute of the International Criminal Court Act*

27 of 2002, and unlawful.” (result, para. 4). It is regrettable that Mr Al Bashir was allowed to enter, remain and leave the territory of a State Party and the South African court’s findings have affirmed South Africa’s obligation as a State Party to arrest and surrender persons sought by the Court.

7. On 6 May 2016, South Africa informed PTC II of this development, indicating that it had also sought leave to appeal the Supreme Court of Appeal’s decision to the Constitutional Court. The South African Government’s request for leave to appeal is pending.
8. During the reporting period, Mr Al Bashir has regularly travelled across international borders. Notably and unfortunately, Mr Al Bashir has been able to travel to two states that are Rome Statute States Parties without hindrance. On 8 May 2016, Mr Al Bashir travelled to the Republic of Djibouti (“Djibouti”) to attend the inauguration of President Ismail Omer Guelleh. Within the same week, Mr Al Bashir travelled to the Republic of Uganda (“Uganda”) on 11 May 2016 to attend the inauguration of President Museveni in Kampala. Both Djibouti and Uganda are State Parties and are under a statutory obligation, indeed a treaty obligation, to execute the outstanding arrest warrants against Mr Al Bashir and surrender him to the Court, once within their jurisdiction. Furthermore, this is not the first time Djibouti has failed to arrest and surrender Mr Al Bashir. Mr Al Bashir visited Djibouti on 8 May 2011 – also to attend the inauguration of President Ismail Omer Guelleh – prompting PTC I to inform the UNSC about the visit, requesting the Council to take appropriate action.
9. In light of the failure of Djibouti and Uganda to arrest and surrender Mr Al Bashir, on 17 May 2016, PTC II forthwith issued two separate decisions *proprio motu* commencing the article 87(7) non-compliance process against Djibouti and Uganda. In order to determine whether a finding of non-cooperation is warranted in the cases of Djibouti and Uganda, PTC II has requested both states to provide observations with respect to their failure to arrest and surrender Mr Al Bashir by 24 June 2016, pursuant to regulation 109 of the Regulations of the Court (“Regulations”). Prior to making a finding of non-cooperation and before referring such a finding to the UNSC, regulation 109 of the Regulations requires that the “Chamber shall hear from the requested State.” Should the Chamber ultimately arrive at findings of non-compliance and refer such non-compliance to the Council, the wilful failure of these State Parties to carry out their clear obligation to arrest Mr Al Bashir should trigger this Council’s urgent and serious attention.
10. In addition to visits to State Parties, Mr Al Bashir also travelled to four states that are not Parties to the Rome Statute during the reporting period. In this regard, the Office recalls UNSCR 1593 which “urges all states [...] to cooperate fully” with the Court. In the interests of justice and accountability, the Office again urges the Council to use its powers under the Charter of the

United Nations to ensure the arrest and surrender of all Sudanese persons against whom arrest warrants are in force, including Mr Al Bashir, should they travel across international borders.

11. This Council referred the Situation in Sudan to the Prosecutor of the Court. Since the referral, this Council has received eleven judicial decisions on the issue of non-compliance and requests for appropriate action to be taken regarding State Parties and non-State Parties that have failed to arrest Mr Al Bashir. Regrettably, to date, this Council has done nothing to show dissatisfaction with the failure of states to take appropriate actions when Mr Al Bashir is on their territories, nor has the Council reprimanded states for their failure to arrest Mr Al Bashir. It is past due for this Council to address this matter and explore how to effectively deal with instances of non-compliance by states and to take corrective measures as necessary. In order to prevent further failures of State Parties to arrest Mr Al Bashir when he travels to their territories, this Council must take strong and concrete measures to compel compliance with the Rome Statute and UNSCR 1593. Unless this Council acts decisively and forcefully there is little prospect for the arrest of Mr Al Bashir and justice will continue to elude the victims of Darfur. Furthermore, this Council's own credibility is undermined by its failure to act in support of UNSCR 1593.

2. ON-GOING INVESTIGATIONS

12. As highlighted in the December 2015 report to the Council, the Office is continuing with its investigations with a view to bringing justice to the victims of the Rome Statute crimes committed in Darfur. Unfortunately, the non-execution of the long outstanding arrest warrants and a severe lack of resources mean that the progress in the investigation is not as rapid as it should be. It is no secret that victims and witnesses are becoming increasingly frustrated by the international community's failure to deliver them justice, and in particular, this Council's inaction in the case of Mr Al Bashir's flagrant disregard of the Council's resolutions. Not only has this Council failed to exercise its powers under the Charter of the United Nations to ensure execution of any of the arrest warrants, but this Council has also failed to provide necessary funding for the Office's investigations in Darfur. Despite all these difficulties, the Office continues to do the best it can to advance its investigations. The Office's resolve to bring justice to victims of Darfur crimes remains unshaken.
13. During the reporting period, the team of lawyers and investigators assigned to the Darfur cases, in particular the cases against the GoS suspects, has taken further investigative steps in order to obtain evidence pursuant to the Office's investigation mandate under article 54(1) of the Rome Statute. For example, the team has interviewed further witnesses, gathered more documentary evidence, developed more investigative leads which have the potential for yielding evidence, reviewed the current evidence collection, and refined systems to gather information concerning victims in Darfur. With the limited resources available, the team has managed to make some

notable progress and has received/collected significant evidence. The team is also monitoring allegations of on-going crimes in Darfur.

2.1 Monitoring of current crimes

14. The Office continues to monitor relevant current crimes allegedly being committed in Darfur. The Office is concerned about a significant increase in aerial bombardments and ground attacks, resulting in 417 civilian deaths and up to 200 villages destroyed. In addition, 107 incidents of sexual crimes against women were reported, resulting in 225 victims. Seventy per cent of these incidents involved gang-rape and 19 per cent involved girls under the age of 18 years. GoS-aligned troops and unidentified assailants are the main alleged perpetrators. Over 129,000 people have been displaced from Jebel Marra since mid-January. According to Radio Dabanga, there might be thousands more displaced hidden in the mountains of Jebel Marra but the United Nations and humanitarian organisations have no access to those areas. There have been five reported incidents of attacks on humanitarian aid workers and peacekeepers, with one peacekeeper killed.

15. In relation to allegations of on-going crimes, the Office is concerned over reports of the activities of the GoS Rapid Support Forces (“RSF”). The RSF have allegedly been involved in the commission of crimes during the reporting period. In one such attack in Central Darfur between 30 December 2015 and 1 January 2016, the Sudanese Armed Forces, RSF and Janjaweed attacked villages in East Jebel Marra. The attack was supported by air raids and artillery fire. Between four and six civilians were allegedly killed, including two children during the ground attack. In another attack on 21 January 2016, aerial bombardments reportedly killed 48 women and destroyed six houses. The Office notes that the *modus operandi* of the alleged attacks employed by the GoS – the use of aerial bombardments followed by militia attacks on the ground – is similar to the manner in which the attacks were carried out in 2003 and 2004. The continuation of the GoS military attacks in Darfur in this manner must be halted. The arrest and surrender of Mr Al Bashir may greatly assist in stopping these crimes.

3. LACK OF COOPERATION BY THE GOS AND OTHER PARTIES

16. Under UNSCR 1593, the Council decided that the “*Government of Sudan and all other parties to the conflict in Darfur shall cooperate fully and provide any necessary assistance to the Court and the Prosecutor.*” Pursuant to this resolution and the orders of the Court’s judges, the pending warrants of arrest have been transmitted to the GoS for execution.

17. Sudan, as the territorial state, has the primary responsibility and is fully able to implement the warrants, consistent with its sovereign authority. It has consistently refused to do so. At the same time, it has also failed to provide any meaningful measure of justice at the national level.

4. CONCLUSION

18. This Council should no longer tolerate the continuing deteriorating humanitarian situation in Darfur, Sudan, the continued non-cooperation of the GoS and in particular, the GoS' refusal to arrest and surrender suspects within its territory.

19. The Office again calls on this Council to ensure Sudan's compliance with UNSCR 1593, and equally calls on States Parties to the Rome Statute to promote cooperation and effect the arrest of individuals wanted by the ICC in the Darfur situation. This is not simply a challenge for those States Parties that the suspects may visit. The Office notes in this regard that in addition to the obligations of States Parties to the Rome Statute, UNSCR 1593 urges all Member States of the UN to cooperate fully with the Court's investigations and prosecutions in Darfur. The Office will continue to monitor and investigate the Darfur situation.

20. Without stronger and committed action by the Council and State Parties, the situation in Darfur, Sudan is unlikely to improve and the alleged perpetrators of serious crimes against the civilian population will not be brought to justice. | **OTP**