

TWENTY-EIGHTH REPORT OF THE PROSECUTOR OF THE INTERNATIONAL CRIMINAL COURT TO THE UNITED NATIONS SECURITY COUNCIL PURSUANT TO UNSCR 1593 (2005)

1. INTRODUCTION

1. On 31 March 2005, the United Nations Security Council (“UNSC” or “Council”) adopted Resolution 1593 (“UNSCR 1593”), referring the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court (“ICC” or “Court”). Pursuant to this resolution, the Council invited the Prosecutor to address it every six months on actions taken in the Darfur situation.
2. This is the twenty-eighth report and update to the Council on the activities of the Office of the Prosecutor (“OTP” or “Office”). In particular, this report gives an update on recent judicial activities, the Office’s ongoing investigations and efforts relating to cooperation in the Darfur situation.

2. THE CASES AGAINST MESSRS AL BASHIR, HARUN, HUSSEIN, KUSHAYB AND BANDA

3. All five suspects in the Darfur situation are yet to be arrested and surrendered to the Court and their status remains unchanged since the Office’s last report dated 20 June 2018. Messrs Omar Hassan Ahmad Al Bashir (“Mr Al Bashir”), Ahmad Muhammad Harun (“Mr Harun”), and Abdel Raheem Muhammad Hussein continue in their senior positions in the Government of the Republic of Sudan (“GoS”). Messrs Ali Muhammad Ali Abd-Al-Rahman (also known as Ali Kushayb) and Abdallah Banda Abakaer Nourain, also remain fugitives from the Court.
4. Over thirteen years after the original referral by the Council, efforts to achieve accountability for victims in the Darfur situation continue to suffer from a lack of cooperation from States, including States Parties to the ICC, members of this Council and the Republic of Sudan (“Sudan”). In the face of this lack of cooperation, the suspects in the Darfur situation continue to evade justice, and in the case of Messrs Al Bashir and Harun, continue to travel internationally.

3. RECENT JUDICIAL ACTIVITIES AND TRAVEL BY THE DARFUR SUSPECTS

Litigation related to the Hashemite Kingdom of Jordan ("Jordan")

5. As the Council will recall, Jordan appealed Pre-Trial Chamber II's ("PTC II" or "the Chamber") decision of 11 December 2017 in relation to its failure to arrest and surrender Mr Al Bashir during his visit to Jordanian territory in March 2017. In this decision, PTC II found, pursuant to article 87(7) of the Rome Statute ("Statute"), that Jordan had failed to comply with its obligations under the Statute and referred the matter to the Assembly of States Parties ("ASP") and the Council.
6. Since the Office's last report to the Council on 20 June 2018, litigation in this matter has continued. On 18 June 2018, professors of international law filed 11 *amici curiae* briefs on the merits of the questions raised in the appeal. On 16 July 2018, Jordan and the Prosecution responded to these observations.
7. In response to the Appeals Chamber's invitation to various stakeholders to participate in the appeal, the African Union ("AU") and the League of Arab States ("LAS") filed written submissions on 13 and 16 July 2018, respectively. Jordan and the Prosecution each responded to these submissions on 14 August 2018.
8. On 27 August 2018, in preparation for the hearing, the Appeals Chamber issued a detailed list of questions to the parties and the *amici curiae*. These questions focused on the following areas: applicable law and its interpretations; head of state immunity under customary international law and conventional law; UNSC referrals under article 13(b) of the Statute and UNSCR 1593; and issues relating to articles 86, 87(7), 97 and 98(2) of the Statute.
9. The appeals hearing was held from 10 to 14 September 2018 and provided the participants with the opportunity to constructively engage on the legal issues raised in Jordan's appeal. On the final day of the hearing, the Chamber invited the parties and the *amici curiae* to file final written submissions by 28 September 2018. In response, the Prosecution, Jordan, the AU, the LAS, and professors of international law filed final submissions.
10. On 20 September 2018, the Appeals Chamber issued a further order inviting the competent authorities of Sudan and Mr Al Bashir to file submissions on relevant issues by 5 October 2018. No submissions were filed by Sudan or Mr Al Bashir.

11. This extensive and inclusive legal process now awaits a final determination by the Appeals Chamber. The Office will keep the Council updated on this matter.

Travel to States Parties

12. Regrettably, during the reporting period, Mr Al Bashir has continued to travel to certain States Parties that have chosen not to comply with their obligations under the Statute to arrest and surrender him to the Court.

13. From 5 to 7 July 2018, Mr Al Bashir reportedly visited the Republic of Djibouti (“Djibouti”). Djibouti failed to arrest and surrender Mr Al Bashir despite a reminder of its obligation to do so by the Registry of the Court through a confidential *note verbale* dated 5 July 2018.

14. Similarly, on 7 July 2018, Mr Al Bashir again visited the Republic of Uganda (“Uganda”). As the Council will recall, this trip followed a recent official visit by Mr Al Bashir to Uganda on 14 November 2017. Following this visit in November, the Chamber invited Uganda to provide submissions on its failure to arrest and surrender Mr Al Bashir and these were provided in a confidential *note verbale* on 22 February 2018.

15. As this Council will recall, in 2016, both Djibouti and Uganda were referred to the ASP and the Council by PTC II for their respective failures, as States Parties to the Statute, to arrest and surrender Mr Al Bashir to the Court while on previous trips to their territory.

16. As noted by the Office in its previous reports to the Council, none of the decisions finding non-compliance and/or referring the matter to the ASP and UNSC have been responded to by the Council. Given the lack of action on the Council’s part, it is unsurprising that States Parties such as Djibouti or Uganda continue to host Mr Al Bashir on their territory, in violation of the Chamber’s previous findings.

17. Despite this lack of collective action on the part of the Council, the Office is grateful for the support offered by many of its members and the constructive proposals made in relation to the Council’s exercise of its powers pursuant to a non-compliance referral by the Court to the Council. Notably, in response to the Office’s twenty-seventh report to the Council in June, the United Kingdom, the French Republic (“France”), the Kingdom of the Netherlands (“Netherlands”), the Kingdom of Sweden, the Republic of Poland and the Republic of Peru all expressed concerns at

the lack of cooperation from the Council and suggested that the Council approach cases of non-compliance referred to it by the Court in a more structured and systematic manner. France, for example, reiterated its proposal that “States which, according to the Court, have not complied with their obligations to cooperate with the Court be invited to address the Security Council.”

18. It is in this context that the Office, once again, urges the Council to take concrete steps in response to non-compliance referrals by the Court. The suggestion by France represents a simple, yet practical and workable option that the Office encourages the Council to adopt.
19. On a positive note, the Office welcomed the 9 July 2018 Declaration by the High Representative on behalf of the European Union (“EU”) on President Al Bashir’s visits to Djibouti and Uganda. The EU expressed regret at the failure by these States Parties to arrest and surrender Mr Al Bashir and called on all Member States of the UN to abide by and implement the resolutions adopted by the Council, notably UNSCR 1593.

Travel to Non-States Parties

20. During the reporting period, Mr Al Bashir has continued to travel to States not party to the Statute, including: the Kingdom of Saudi Arabia on 10 June 2018, the Federal Democratic Republic of Ethiopia on 21-22 June 2018, 12 September 2018 and on 17 and 18 November 2018, the Islamic Republic of Mauritania from 30 June 2018 to 2 July 2018, the Republic of Turkey (“Turkey”) on 9 July 2018 and from 28 to 30 October 2018, the People’s Republic of China from 31 August to 5 September 2018, the Russian Federation from 13 to 16 July 2018, Equatorial Guinea from 11 to 13 October 2018, South Sudan on 31 October 2018 and the Arab Republic of Egypt on 6 November 2018.
21. In addition, Mr Harun reportedly travelled to Turkey at the end of October 2018.

4. ONGOING INVESTIGATIONS

Current investigations

22. During the current reporting period, significant progress was achieved by the Darfur investigation team. Additional relevant evidence was collected, including a number of important witness statements. The Office will continue to pursue all opportunities to strengthen and corroborate the existing body of evidence in the Darfur situation

and is grateful for the continued cooperation and assistance received from a number of States Parties in the course of this work.

Enquiries into allegations of current crimes

23. The Office welcomes the fact that the level of violence reported against civilians in Darfur has continued to decrease during the reporting period. The Office however notes that in its Resolution 2429 (2018) of 13 July 2018 (“UNSCR 2429”), the Council recognised the reduced ability of the African Union-United Nations Hybrid Operation in Darfur (“UNAMID”) to monitor and verify reported human rights violations in the areas from which it has withdrawn.
24. In relation to the ongoing armed conflict in the Jebel Marra area, the Office notes that during the reporting period, several clashes were reported between GoS forces and the Sudan Liberation Army–Abdul Wahid (“SLA-AW”). According to UNAMID, fighting has led to the destruction of villages, and the killing, injury and displacement of civilians. Notably, the United Nations Office for the Coordination of Humanitarian Affairs reported that in early July 2018, approximately 900 people fled to Golo from their homes in the East Jebel Marra locality following fighting between GoS forces and non-state armed groups.
25. In September 2018, armed clashes in South Jebel Marra reportedly resulted in further displacement and the killing of ten civilians in Gubbo.
26. Although the security situation has improved across Darfur, attacks against civilians, in particular internally displaced persons (“IDPs”), reportedly continued. The number of IDPs across Darfur remains high. In October, UNAMID reported that since January 2018, approximately 14,026 people have been displaced into various camps in and around Jebel Marra in South and Central Darfur. The Office also notes that the Council reported in UNSCR 2429 that approximately two million people remain long-term displaced in Darfur.
27. Sexual and gender-based violence against women remains a serious concern, severely restricting women’s freedom of movement in IDP camps and areas of return. These alleged crimes against women and girls are of particular concern to the Office. UNAMID reported that between 11 June and 3 October 2018, there were 38 alleged cases of sexual and gender-based violence, including rape, involving 88 victims, amongst them 24 minors.

5. LACK OF COOPERATION

28. The Security Council decided in UNSCR 1593 that the “Government of Sudan and all other parties to the conflict in Darfur, shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor.” Despite this unequivocal decision by the Council, the GoS continues to openly disregard its obligation to cooperate fully with the Office.
29. Cooperation from all States, in particular States Parties and Sudan, is essential for the Office to effectively fulfil the mandate bestowed upon it by UNSCR 1593 in relation to Darfur. The arrest and surrender of the fugitives constitutes only one aspect of the necessary cooperation between States Parties, the Council, Sudan and the Office. Amongst other things, cooperation, particularly from Sudan, could facilitate crucial access to victims and to alleged crime scenes, and the collection of critical documentary and forensic records.
30. Notwithstanding Sudan’s refusal to cooperate with the Court, the Office has continued to rely on the principled cooperation of other States in its ongoing investigations of the situation in Darfur. The Office is grateful for the cooperation it continues to receive from these States.
31. In that context, the Office recalls that, on 6 July 2018, States Parties to the Statute that are members of the Council, convened a timely Arria-formula meeting on relations between the Court and the Council. The Prosecutor, the President of the ASP, the UN Assistant Secretary-General for Legal Affairs, States and civil society representatives engaged in a constructive dialogue on the important relationship between the Court and the Council. This meeting provided an invaluable opportunity for the Prosecutor and the participants to consider and discuss ways of further enhancing coordination between the Court and the Council.
32. In that regard, the Office notes in particular that a majority of the participants in the Arria-formula meeting expressed concerns at the lack of follow-up by the Council in instances where a State Party was referred to it pursuant to a finding of non-compliance by the Court, and advocated for concrete measures to be adopted by the Council in that regard. A number of such measures have been presented to this Council and the Office remains hopeful that one or more of these will be implemented. The Office would like to reiterate its gratitude to the Netherlands, and

all other ICC States Parties on the Council that co-hosted this unique session, and all who contributed to those productive discussions.

33. Finally, the Office welcomes the Council's adoption of UNSCR 2429 which extended UNAMID's mandate until 30 June 2019 and reiterated the Council's demand "that all parties to the conflict in Darfur immediately end violence, including attacks on civilians, peacekeepers and humanitarian personnel."

6. CONCLUSION

34. In conclusion, the Office renews its appeal to the Council to scale up its support to the Office specifically, and the Court more generally, in relation to the Darfur situation.

35. In UNSCR 2429, the Council stressed the importance that it "attaches to ending impunity, including through ensuring accountability and bringing to justice perpetrators of crimes, [...] committed by all parties in Darfur [...]."

36. The Office respectfully invites this Council to demonstrate the importance that it attaches to ending impunity and ensuring accountability by taking tangible steps in support of the Office, in its pursuit of justice for the victims in the Darfur situation. Without concrete action by this Council and States Parties to assist the Office in its investigations and in the arrests of the Darfur suspects, there can be no justice for the victims in Darfur. | OTF