



TWENTY-NINTH 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”). The Council invited the Prosecutor to address it every six months on actions taken pursuant to UNSCR 1593. This is the twenty-ninth report to the Council on the activities of the Office of the Prosecutor (“OTP” or “Office”) in relation to the situation in Darfur. In particular, this report provides updates on judicial activities and the Office’s on-going investigations, monitoring of crimes in Darfur and issues of cooperation.

2. RECENT DEVELOPMENTS IN SUDAN

2. As the Council is aware, the Republic of the Sudan (“Sudan”) is in the process of a major political transition. On 22 February 2019, following months of anti-government protests, former President Omar Hassan Ahmad Al Bashir (“Mr Al Bashir”) declared a year-long state of emergency and dissolved state and federal governments.
3. On 11 April 2019, following continued anti-government protests, then First Vice President and Minister of Defence, Lt. General Awad Mohamed Ahmed Ibn Auf (“Ibn Auf”), announced that former President Mr Al Bashir had been arrested, that the Constitution had been suspended, and the National Legislature dissolved. Lt. General Ibn Auf also announced the formation of a Transitional Military Council (“TMC”).
4. Following these events, reports indicate that the TMC, under Lt. General Abdel Fattah Al Burhan, has engaged in dialogue with Sudanese stakeholders on the parameters and content of the political transition in Sudan. Recent reports indicate that this dialogue has broken down amidst deadly violence related to the dispersal of protestors in Khartoum by Sudan’s security forces.

5. Mr Al Bashir was reportedly transferred to Kober prison, Khartoum, on 17 April 2019. Sudanese media has reported that Mr Al Bashir faces domestic charges in relation to money laundering, financing terrorism and the killing of demonstrators during the anti-government protests prior to his arrest.
6. As regards the current status of the other suspects in the Darfur situation, there are unconfirmed reports in Sudanese and international media that Ahmad Muhammad Harun (“Mr Harun”) and Abdel Raheem Muhammad Hussein (“Mr Hussein”) were also arrested on 11 April 2019. At the time of his reported arrest, Mr Harun held the position of head of the National Congress Party.
7. All of the ICC arrest warrants for the suspects in the Darfur situation, namely Messrs Al Bashir, Hussein, Harun, Ali Muhammad Ali Abd-Al-Rahman (also known as Ali Kushayb) and Abdallah Banda Abakaer Nourain, remain in force.
8. Pursuant to UNSCR 1593 and the subsequent orders of the ICC’s judges, Sudan remains under an obligation to immediately execute these warrants and transfer the suspects to the ICC to stand trial. The Office recalls that in accordance with the principle of complementarity, the primary responsibility to investigate and prosecute crimes under the Rome Statute (the “Statute”) rests with States. The Office stands ready to engage in dialogue with the authorities in Sudan to ensure that persons against whom warrants of arrest have been issued face justice, either at the ICC, or in Sudan.

3. RECENT JUDICIAL ACTIVITIES AND TRAVEL BY THE DARFUR SUSPECTS

Litigation related to the Hashemite Kingdom of Jordan (“Jordan”)

9. On 6 May 2019, the Appeals Chamber delivered its judgment on Jordan’s appeal of Pre-Trial Chamber II’s (“PTC II”) 11 December 2017 decision regarding Jordan’s failure to arrest and surrender Mr Al Bashir while he was in Jordan in March 2017.
10. The Appeals Chamber unanimously dismissed the first two grounds of appeal against the PTC II decision, and agreed with PTC II that Jordan had failed to comply with its obligations under the Statute to execute the Court’s request for the arrest and surrender of Mr Al Bashir. The Appeals Chamber found that this non-compliance had prevented the Court from exercising “an important power and a fundamental function” and that “[t]hose who bear the obligation to execute an arrest warrant are not free to render it nugatory merely by refusing to execute it.” However, on the third

ground, the Appeals Chamber, by majority, determined that under the particular circumstances of the case, PTC II had erroneously exercised its discretion to refer Jordan to the Assembly of States Parties (“ASP”) and to the Council, and therefore reversed this part of PTC II’s decision.

11. In confirming that Jordan had failed to comply with its obligations under the Statute, the Appeals Chamber found that pursuant to article 27(2) of the Statute, there is no Head of State immunity when the Court requests that a State Party arrest and surrender the Head of State of another State Party.
12. The cooperation regime applicable to States Parties is equally applicable to States such as Sudan, which the Council requires to “cooperate fully” with the Court, pursuant to a resolution under Chapter VII of the United Nations (“UN”) Charter. As a Member State of the UN, Sudan is bound by such decisions, pursuant to article 25 of the UN Charter. Therefore, Sudan’s obligation to “cooperate fully” with the Court and the Prosecutor, as mandated by the Council in paragraph two of UNSCR 1593, is legally binding. According to the Appeals Chamber, this means that Sudan, like a State Party, could neither assert Head of State immunity for Mr Al Bashir *vis-à-vis* the Court or another State acting at the Court’s request, such as Jordan.
13. The Appeals Chamber further held, over and beyond its analysis of the Statute and effect of resolutions of the Council, that neither state practice nor *opinio juris* would support the existence under customary law of Head of State immunity for international crimes before an international court acting in exercise of its proper jurisdiction. In this respect, the Appeals Chamber considered that article 27(2) of the Statute reflects the status of customary international law.
14. On these grounds, the Chamber found that there was no need for the Court to obtain a waiver of immunity from Sudan under article 98(1) of the Statute before it could proceed with a request to Jordan for Mr Al Bashir’s arrest and surrender.
15. Likewise, the Appeals Chamber considered that any immunities arising from the accession of Jordan and Sudan to the 1953 Convention on the Privileges and Immunities of the League of Arab States (“1953 Convention”) must be waived by Sudan, through the effect of its duty under UNSCR 1593 to cooperate fully with the Court.

16. The Appeals Chamber also confirmed that PTC II did not err in finding that article 98(2) of the Statute did not apply to the 1953 Convention. This provision does not concern immunities, but rather “agreements according to which a receiving State undertakes not to surrender a person of the sending State to the Court without prior consent”, such as status of forces agreements.
17. Furthermore, the Appeals Chamber found that both Jordan and Sudan are bound to “undertake to prevent and punish genocide” as parties to the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. The Appeals Chamber determined that this placed an additional obligation on Jordan to arrest and surrender Mr Al Bashir, given that the second warrant of arrest for Mr Al Bashir includes the charge of genocide.
18. Acting by majority, however, the Appeals Chamber reversed the part of the PTC II decision referring Jordan’s non-compliance to the ASP and the Council. In the view of the majority, because article 97 does not specify a particular procedure by which State Parties must consult with the Court, any “discernible indication” of intent to do so will meet the requirements of the Statute. On this basis, the Appeals Chamber found that PTC II had treated Jordan and Republic of South Africa differently in deciding to refer Jordan’s non-compliance, abusing its discretion.
19. Two members of the Appeals Chamber disagreed. By contrast with the majority, they considered that Jordan had not consulted with the Court but had merely indicated its intent to refuse to cooperate with the Court’s request. In particular, the dissenting judges considered that “the timing and manner of approaching the Court display a deliberate intention to refuse cooperation, contrary to the object and purpose of [the Statute] to which [Jordan] voluntarily acceded. It cannot therefore be maintained that Jordan acted in good faith.”
20. The judgment of the Appeals Chamber on 6 May 2019 concluded a broad and inclusive legal process that benefitted from the input of the African Union, the League of Arab States, Jordan, multiple professors of international law, as well as the Office in the ordinary course of its duties.
21. The Appeals Chamber has now unequivocally confirmed the legal obligation of State Parties to arrest Heads of State subject to ICC jurisdiction. While Mr Al Bashir may no longer avail himself of Head of State immunity in any event, the legal issues in the judgment remain of crucial relevance to future cases before the Court.

Travel to Non-States Parties

22. During the reporting period, prior to his reported arrest and detention in Sudan, Mr Al Bashir did not travel to any States Parties. In relation to States not party to the Statute, Mr Al Bashir reportedly travelled to the Syrian Arab Republic on 16 December 2018, the State of Qatar on 22 January 2019, the Arab Republic of Egypt on 27 January 2019, and the Federal Democratic Republic of Ethiopia on 9 February 2019.
23. In addition, Mr Hussein reportedly travelled to Qatar on 22 January 2019 and Mr Harun also reportedly travelled to Qatar on 20 March 2019.

4. ONGOING INVESTIGATIONS

Current investigations

24. During the current reporting period, the Darfur investigation team continued to make progress. As discussed below, the support of States, including Sudan, remains essential to the Office's evidence gathering process.

Enquiries into allegations of current crimes

25. The current reporting period was characterised by protests against the Government of Sudan since mid-December 2018 in major cities of Sudan. During those protests, security forces reportedly used excessive force against civilian protestors and arbitrarily detained hundreds of civilians including opposition members, journalists, doctors, lawyers and Darfuri students. According to the United Nations High Commissioner for Human Rights, Michelle Bachelet, this resulted in the deaths of 70 people, as of 9 April 2019. The United Nations Secretary-General also strongly condemned the reported excessive use of force by Sudan's security personnel on civilians in Khartoum on 3 June 2019 that resulted in the deaths and injury of protestors. In Darfur, security forces allegedly killed several people during protests. The Office notes that abuses against protestors continue to be reported including in Darfur.
26. As indicated in the 10 April 2019 report of the Secretary-General in relation to the African Union-United Nations Hybrid Operation in Darfur ("UNAMID"), the overall security situation in Darfur has reportedly remained relatively stable since January 2019. During the current reporting period, the number of reported civilian casualties decreased to approximately 50 compared to approximately 100 in the previous reporting period.

27. The notable exception to this relative stability in Darfur remains the ongoing conflict in the Jebel Marra area, where intermittent clashes between the security forces and the Sudan Liberation Army–Abdul Wahid (“SLA-AW”) and fighting between factions of the SLA-AW continued.
28. The 10 April 2019 UNAMID report notes that Sudan’s security forces allegedly attacked the village of Sabun El Fagur, East Jebel Marra on 24 January 2019, causing an undetermined number of deaths. UNAMID was unable to verify the incident as it was denied access to the area by Sudan’s security forces. A militia also reportedly attacked the village of Katur, West Darfur, on 23 January 2019, killing two civilians, burning 48 houses, and stealing 180 cattle. Internal SLA-AW fighting led to the death of five Fur civilians, reportedly suspected of collaborating with opposition factions.
29. In relation to internally displaced persons (“IDPs”), UNAMID further noted that fighting between Sudan’s security forces and the SLA-AW resulted in the displacement of hundreds of people in East Jebel Marra in February 2019. Despite such incidents of displacement, the overall number of IDPs in Darfur continues to decrease. In March 2019, the United Nations Office for the Coordination of Humanitarian Affairs reported 1.64 million IDPs in Darfur, as compared to the 1.76 million IDPs noted in the previous reporting period.
30. Regrettably, incidents of sexual and gender-based violence against women, including conflict-related sexual violence, continue in Darfur. UNAMID reported 15 such alleged incidents, involving 26 victims, including incidents of rape of five displaced girls aged between 13 years and 18 years old. This sexual and gender-based violence continues to restrict the freedom of movement of women and girls both in IDP camps and areas of return.
31. Finally, the Office notes with concern the reported looting and vandalising of UNAMID Headquarters in El Geneina on 14 May 2019, allegedly committed by a crowd that included Government of Sudan military and police personnel.

5. COOPERATION

32. On 31 March 2005, when the Council decided to refer the situation in Darfur to the ICC Prosecutor pursuant to Chapter VII of the UN Charter, the Council unambiguously determined 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.”

33. The full cooperation of States, including States not party to the Statute, is crucial for the Office to effectively achieve its mandate to conduct independent, impartial, and effective investigations and prosecutions of crimes under the Statute. The Office relies on cooperation by States to gain entry to the territory where alleged crimes occur and to access evidence, including witnesses, documents, and forensic and judicial records. Critically, under the Rome Statute system, the Office also relies on States for the apprehension, arrest, and surrender of ICC fugitives.
34. As the Council is aware, this cooperation, which is so crucial to the Office's work in the Darfur situation, has not, to date, been forthcoming from Sudan. The Office is hopeful that Sudan's political transition will result in a new chapter of positive cooperation, in which Sudan complies with its obligation under UNSCR 1593 and cooperates fully with the Office and the Court.
35. In the interim, the Office has continued to rely on the principled cooperation of other States for its ongoing investigations in the situation in Darfur. The Office is grateful to those States that continue to provide this crucial assistance. In particular, the Office notes the support that it has received from States, including members of this Council, which have publicly called for Sudan's cooperation with the ICC, including following recent developments in Sudan.
36. The Office continues to look to the Council to safeguard the Court's ability to fulfil its mandate in the Darfur situation by taking principled measures against those States that have been referred to the Council for failing to cooperate with the Court.

6. CONCLUSION

37. In conclusion, Sudan is at a crossroads. Victims in the Darfur situation have long sought justice for the horrific crimes that they suffered. Their desire to ensure alleged perpetrators are held accountable, through fair and impartial trials, has not waned, even as the world's attention has moved on to other matters. The eyes of the world are fixed once again on Sudan and justice for the victims in the Darfur situation can be within reach.
38. The Office is hopeful that Sudan's new administration will demonstrate its commitment to justice and sustainable peace in Sudan by opening a new chapter of cooperation with the Office and the Court. As the Prosecutor stated in her statement before the Council on 20 June 2018, "sustainable peace and stability can only return to

Darfur once the root causes of conflict are addressed. This includes ending impunity for alleged crimes under the Rome Statute in Darfur and ensuring accountability for the victims of these serious crimes.”

39. The Office stands willing to engage with the Sudanese authorities to explore all possibilities for cooperation pursuant to UNSCR 1593 and the Statute with full respect for the principle of complementarity enshrined therein.

40. Now is the time for the Council and all States Parties to lend full and unequivocal support to the Sudanese people, the Office of the Prosecutor, and all those stakeholders committed to ensuring peace and accountability for atrocity crimes in Darfur. | OTP