



## TWENTY-SIXTH 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 (“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”) and inviting the Prosecutor to address the Council every six months on actions taken pursuant to UNSCR 1593.
2. This twenty-sixth report provides an update to the Council on the developments in the Darfur situation since the Office of the Prosecutor’s (“OTP” or “Office”) last report dated 8 June 2017. In particular, this report gives an update on the Office’s on-going investigations as well as recent judicial activities.
3. Regrettably, all the suspects in the Darfur situation remain at large and their status remains unchanged since the last report. In particular, Mr Omar Hassan Ahmad Al Bashir (“Mr Al Bashir”), Mr Ahmad Muhammad Harun (“Mr Harun”), and Mr Abdel Raheem Muhammad Hussein (“Mr Hussein”) continue in their senior positions in the Government of the Republic of the Sudan (“GoS”). Mr Ali Muhammad Ali Abd-Al-Rahman (also known as Mr Ali Kushayb) and Mr Abdallah Banda Abakaer Nourain also remain at large.
4. The success of the referral of the Darfur situation to the Office continues to depend heavily upon the cooperation of States, especially States Parties to the Rome Statute (“States Parties”) and members of this Council, as the body that referred the Darfur situation to the Office pursuant to UNSCR 1593. In particular, decisive steps are required to support the arrest and surrender of ICC suspects.

### 2. RECENT JUDICIAL ACTIVITIES

#### *Litigation related to South Africa*

5. On 6 July 2017, Pre-Trial Chamber II (“PTC II” or “Chamber”) rendered an important decision that concluded the proceedings relating to the failure by the Republic of South

Africa (“South Africa”) to arrest Mr Al Bashir whilst he was on South African territory from 13-15 June 2015 to attend an African Union summit.

6. In its 6 July 2017 decision, after having fully considered the issue, PTC II held that South Africa failed to comply with the Court’s request for the arrest and surrender of Mr Al Bashir, in violation of the provisions of the Rome Statute (“Statute”).
7. In reaching that conclusion, the Chamber found by majority that the necessary effect of the Council’s resolution triggering the Court’s jurisdiction in the situation in Darfur and imposing on Sudan the obligation to cooperate fully with the Court, is that, for the limited purpose of the situation in Darfur, Sudan has rights and duties analogous to those of States Parties. Accordingly, the Chamber found that the interactions between Sudan and the Court with respect to the Court’s exercise of jurisdiction in the situation in Darfur are regulated by the Statute. The Chamber further found that one consequence of this is that article 27(2) of the Statute, which relates to the irrelevance of official capacity, applies equally with respect to Sudan and therefore renders inapplicable any immunity on the ground of official capacity belonging to Sudan that would otherwise exist under international law.
8. PTC II found that this meant that first, Sudan cannot claim, vis-à-vis the Court, Mr Al-Bashir’s immunity as Head of State and that it therefore had an obligation to arrest and surrender him to the Court. Second, the immunities of Mr Al Bashir as Head of State do not apply vis-à-vis States Parties in the context of a request to arrest and surrender made by the Court. Accordingly, article 98(1) – which concerns situations of possible State or diplomatic immunity preventing the arrest and surrender of an individual – does not apply to Mr Al Bashir as he does not enjoy any immunity under the Statute. No immunity needs to be waived, and States Parties can execute a request by the Court to arrest and surrender Mr Al Bashir without violating Sudan’s rights under international law. The Chamber concluded “that States Parties, including South Africa, have the obligation to arrest Omar Al-Bashir and surrender him to the Court.”
9. Despite this finding of non-compliance, using the discretion afforded to it under article 87(7) of the Statute, the Chamber ruled that a referral to the Assembly of the State Parties (“ASP”) and/or the Council was not warranted in the case of South Africa. In doing so, the Chamber considered that South Africa was the first State Party to specifically invoke article 97 in an attempt to resolve what it perceived to be conflicting international obligations. That, in the Chamber’s view, set South Africa apart from other States which failed to invoke article 97 when involved in similar proceedings in the past. In addition, the Chamber noted that domestic courts found South Africa’s conduct to be inconsistent with both the

country's domestic legal framework and the Statute. According to the Chamber, South Africa seemingly accepted its obligation to cooperate with the Court under its domestic legal framework when the Government withdrew its previously lodged appeal against the Supreme Court of Appeal's decision.

10. The Chamber noted that it had now been unequivocally established, both domestically and by the Chamber, that South Africa must arrest Mr Al-Bashir and surrender him to the Court. Given that any doubt regarding South Africa's obligation to arrest and surrender Mr Al Bashir to the Court has been removed, the Chamber concluded that a referral to the Council or the ASP would be of no consequence as a mechanism for the Court to obtain cooperation.
11. Finally, PTC II also highlighted that despite having referred States Parties to the ASP and/or the Council in the Darfur situation in six instances in the past, no measure has ever been taken by the Council in its past 24 meetings following the adoption of UNSCR 1593, to ensure cooperation from these States.
12. Neither South Africa nor the Office appealed this decision.
13. The ICC relies on the cooperation of States to carry out the arrest and surrender of suspects. Pursuant to article 13(b) of the Statute, acting under Chapter VII of the Charter of the United Nations ("UN"), the Council has the power to refer a particular situation to the Prosecutor of the Court. The Council also has the corresponding duty to ensure that States honour their treaty obligations under the Statute by arresting and surrendering suspects wanted by the Court. However, despite the Office's numerous appeals to this Council, no action has been undertaken by the Council. The Office regrets the Council's repeated failure to give effect to the Court's decisions that have found States Parties and Sudan in non-compliance of their obligations.

#### *Travel to States Parties*

14. As the Council will recall, the Hashemite Kingdom of Jordan ("Jordan") failed to arrest and surrender Mr Al Bashir to the Court following his attendance at the 28<sup>th</sup> Arab League Summit in Amman on 29 March 2017. Jordan failed to arrest and surrender Mr Al Bashir despite having received the Registry's reminder to cooperate with the Court on 21 February 2017.
15. Since the last report, additional *note verbales* have been provided by Jordan to the Court. On 18 September 2017, PTC II requested further information from Jordan on this matter. On 18

October 2017, PTC II received, *via* the Registry, the requested additional information in a *note verbale* from Jordan.

16. The Chamber has yet to make a finding with respect to Jordan's failure to arrest and surrender Mr Al Bashir pursuant to article 87(7) of the Statute and decide whether a referral to the Council and/or ASP is warranted.
17. Following the publication of press reports indicating that Mr Al Bashir was expected to visit the Republic of Uganda ("Uganda") during the week of 13 November 2017, the Registry again reminded Uganda of its obligation to arrest and surrender Mr Al Bashir through a *note verbale* on 8 November 2017. To date, no reply has been received from the Ugandan authorities. A two-day official visit by Mr Al Bashir to Uganda reportedly took place on 14 and 15 November 2017.
18. On 15 November 2017, the head of the International Crimes Division of the High Court in Uganda (the "High Court"), heard an application by the Uganda Victims Foundation that included a request for the issuance of a provisional and standing warrant of arrest for Mr Al Bashir. The High Court decided not to issue a spontaneous warrant of arrest against Mr Al Bashir. The hearing of the remainder of the case was adjourned to December 2017. The High Court's decision was reportedly based, at least in part, on the fact that Uganda is already awaiting sanctions by the Council following a referral by PTC II for Uganda's failure to arrest and surrender Mr Al Bashir during a visit to Uganda in May 2016.
19. Uganda's previous non-compliance was referred to the Council in July last year. It is unfortunate that this referral, which has not been acted on by this Council, appears to have negatively impacted the commendable efforts of a civil society organisation to ensure that Uganda, as a State Party, complies with its treaty obligations to arrest and surrender Mr Al Bashir.
20. More positively, the Office welcomes the declaration by the European Union ("EU") on 14 November 2017 in which it expressed regret for Mr Al Bashir's visit to Uganda. The EU called upon all Member States of the UN to abide by and implement the resolutions adopted by the Council under Chapter VII of the UN Charter, notably UNSCR 1593. The EU also urged Uganda to honour its obligations under international law and as a State Party to the ICC.
21. There are 14 judicial decisions finding non-compliance and/or requesting that appropriate action be taken against States Parties and Sudan for failing to arrest Mr Al Bashir, and other fugitives in the Darfur situation. Regrettably, the Council has yet to give effect to those

decisions referred to it. The Council's failure to take appropriate action against States Parties that invite or host Mr Al Bashir only fosters impunity and leaves the Court unable to achieve its most basic functions.

22. The Office recalls New Zealand's recommendation that the Council take a more active and consistent approach to such findings of non-compliance. In that respect, New Zealand suggested that when a finding of non-compliance is received, the Council use all the tools at its disposal, such as formal draft resolutions – as has been done for Libya – or statements, the dispatch of a letter, or a meeting with the country concerned. The Office urges the Council to give serious consideration to these proposals in order to find practical and meaningful ways to respond to the Court's referrals.
23. In addition, the Office appreciates the continued support expressed by those members of this Council - such as Uruguay, Japan or France - that following the Prosecutor's June 2017 briefing, called for effective solutions to be found in cases of non-cooperation by States Parties and advocated for a more active role on the part of the Council.
24. As underlined by Sweden during the Prosecutor's last briefing before the Council, the suspects' ability to travel internationally "sends a public message that the decisions of the Court can be ignored without any consequence, which in turn, undermines the authority of the Council."
25. The Office therefore, once again, reiterates its appeal to the Council to take appropriate steps to ensure that States Parties that invite and host suspects on their territory comply with their obligations to cooperate with the Court and arrest and surrender suspects in the Darfur situation. It also invites the Council to remind the GoS that it remains under a legal obligation to immediately arrest and surrender Mr Al Bashir and other suspects wanted by the Court in the Darfur situation.

#### *Travel to Non-States Parties*

26. Since the last reporting period, Mr Al Bashir has continued to travel to States not party to the Statute, including: to the Federal Democratic Republic of Ethiopia on 12 June 2017 and 3 to 4 July 2017; to the Kingdom of Saudi Arabia on 19 June 2017, 18 July 2017 and 29 August to 4 September 2017; to the United Arab Emirates on 17 July 2017; to the Kingdom of Morocco on or about 3 August and to the Republic of Rwanda on 18 August 2017. In relation to each of these trips, a *note verbale* was sent by the Registry of the Court to the relevant State, inviting cooperation in the arrest and surrender of Mr Al Bashir. To date, no replies have been received by Registry to any of these *notes verbales*.

27. In addition, according to open source information gathered by the Office, Mr Al Bashir is reportedly due to travel to the Arab Republic of Egypt to participate in the African Investment Forum in Sharm El-Sheikh in early December.
28. On 23 November 2017, Mr Al Bashir visited the Russian Federation. In relation to this visit, the EU again called on Member States of the UN to abide by and implement resolutions adopted by the Council under Chapter VII of the UN Charter, notably UNSCR 1593.
29. As for the other suspects in the Darfur situation, Mr Hussein purportedly travelled to the Republic of Belarus to meet with the Minsk Oblast Governor on 2 November 2017. On 20 November 2017, Mr Harun was reportedly in the State of Qatar, meeting with officials, to discuss economic cooperation between the two countries.

### 3. ON-GOING INVESTIGATIONS

#### *Current investigations*

30. As mentioned in the last report, in 2017, additional investigators and analysts joined the team working on the Darfur situation. The Office continues to investigate and strengthen its cases against the suspects in the Darfur situation by pursuing new investigative leads and collecting additional evidence.
31. The Office is allocated a limited budget to conduct investigations into multiple situations before the Court. Due to the pressing needs of investigations in other situations, the investigations into the Darfur situation operate on the basis of severely restricted funding which invariably affects the pace of the investigation. The Office, therefore, once again, invites the Council to support and facilitate financial assistance from the UN which would allow the Office to conduct investigations in the Darfur situation more effectively.

#### *Inquiry into allegations of current crimes*

32. The Office welcomes the continued decrease in fighting between the GoS and the rebel forces in Darfur as well as the decrease of the level of violence against civilians witnessed in the current reporting period. Based on available open sources, the total number of civilian deaths ranges from 81 to 101. Among those, between 15 and 33 civilians were reportedly killed during ground attacks by GoS forces, including border guards and the Rapid Support Forces ("RSF"). No aerial bombardment has been reported in the past six months.

33. Despite these developments, the security and human rights situation in Darfur remains volatile and unpredictable. The situation is most concerning with respect to the 2.1 million internally displaced persons (“IDPs”) in Darfur. Regrettably, this number has remained unchanged since the last reporting period. According to the information available, 30,000 to 40,000 people were displaced from Ensiro, North Darfur, and another 5,000 people were forced to leave Thur, in the Jebel Marra area, following attacks by armed men at the end of May and the beginning of June 2017.
34. Keeping in mind that rape and sexual violence are consistently and systematically underreported in conflict areas, the Office notes that the number of reported rapes has purportedly declined during the current reporting period. Nevertheless, UNAMID reported “27 cases of sexual and gender-based violence, in the form of rape and attempted rape involving 31 victims, including 15 minors (all girls)” between August and October of this year alone. In addition, according to the information available to the Office, many of the rape victims were allegedly gang-raped by the Sudanese Armed Forces (“SAF”) or other unidentified armed men.
35. During the current reporting period, arbitrary arrests and other human rights violations by the GoS against political opponents and human rights activists also continued. In particular, numerous Darfuri students were reportedly subject to illegal detention and other unlawful restrictions of their freedom of expression, association and assembly. In September, the GoS security services reportedly arrested about 30 Darfuri students, members of the United Popular Front, a faction of the Sudan Liberation Army- Abdul Wahid (“SLA-AW”), some of whom remained detained without charge on 12 October 2017, a month after their arrest. According to several sources, Darfuri students also faced other human rights violations including extra-judicial killings, arbitrary dismissals from universities, raids/expulsions from dormitories, and unfair trials.
36. In this general context of instability, the Office is deeply concerned by Mr Al Bashir’s recent speech calling for the dismantlement of the IDP camps in Darfur. The GoS’ stated desire to see the displaced populations return to their areas of origin was noted by the Council in Resolution 2363 (2017) (“UNSCR 2363”) and the Office supports the Council’s view that any return should be “safe, voluntary and in accordance with international law.” The Office joins the Council in reiterating the importance of achieving “dignified and durable solutions for refugees and IDPs.”

#### 4. LACK OF COOPERATION

37. Paragraph 2 of UNSCR 1593 stressed 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.” In its July 2017 decision in relation to South Africa, the Chamber again made clear that Sudan has the obligation to arrest Mr Al Bashir and surrender him to the Court. To date, however, the GoS’ policy of complete non-cooperation with the Court in general and the Office in particular, has remained unchanged.
38. The Office appreciates the cooperation it continues to receive from certain States in relation to its investigative missions on their territory. As already mentioned, the Office regrets nonetheless, that a number of States, including States Parties, continue to raise what they perceive as conflicting international obligations as a bar to the arrest and surrender of the Darfur fugitives. In that context, the Office continues to urge any State Party that may identify a challenge precluding it from fully cooperating under the Statute to timely consult with the Court to resolve the matter.
39. Additionally, the Office welcomes the adoption by the Council of UNSCR 2363 which extends the mandate of UNAMID until 30 June 2018.
40. UNSCR 2363 recalls earlier resolutions of the Council on the situation in Darfur and reiterates the Council’s determination to “condemn[s] all violations of international humanitarian law and violations and abuses of human rights.” The same resolution also reiterates the Council’s demand that “all parties in Darfur immediately end attacks targeting civilians, peacekeepers and humanitarian personnel, and comply with their obligations under international human rights law and international humanitarian law as applicable, and that the Government of Sudan hold perpetrators accountable.”
41. In keeping with UNSCR 2363’s request to the GoS to hold perpetrators accountable, the Office once again urges the GoS, as the primary focus of the Council’s resolutions regarding Sudan, to cooperate with the Court by arresting and surrendering all suspects in the Darfur situation.
42. The Office also renews its call to the Council to devise means to support the Court’s mandate in Darfur including by facilitating financial assistance from the UN, calling for cooperation from all States with the Office’s investigations in Darfur and giving due consideration to referrals it receives from the Court following findings of non-compliance under the Statute.

## 5. CONCLUSION

43. To conclude, the challenges the Office faces in the Darfur situation and the support needed to overcome them, are by now well known to all, including, in particular, this Council.
44. The Office will continue to strive to meet these challenges in an effort to ensure justice for the victims in the Darfur situation who have suffered the plight of war and conflict for well over a decade. To this end, although the support of the Council cannot be compelled, it is more necessary than ever to the ongoing efforts of the Office in the Darfur situation. | OTP