



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

INTRODUCTION

1. The present report is submitted by the Prosecutor of the International Criminal Court (ICC) pursuant to paragraph 8 of UN Security Council Resolution (UNSCR) 1593 of 31 March 2005. It outlines judicial activities undertaken since the last report on 4 December 2009, and cooperation received or lack thereof from the Sudan and other Parties.
2. On 31 March 2005, in UNSCR 1593 (2005), the Security Council determined that the situation in Sudan continued to constitute a threat to international peace and security and, acting under Chapter VII of the Charter, decided to refer the situation in Darfur since 1 July 2002 to the Prosecutor of the ICC. UNSCR 1593 provided jurisdiction to the Court.
3. The Prosecution has presented three cases to the Judges of the Pre-Trial Chamber: the case of Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman (Ali Kushayb), the case of Omar Hassan Al Bashir, and the case of Bahar Idriss Abu Garda.
4. In the first case, presented on 27 February 2007, the Prosecution's evidence showed how Harun and Kushayb joined together to persecute and attack civilians in Darfur. Ahmad Harun coordinated a system through which he recruited, funded and armed Militia/*Janjaweed* to supplement the Sudanese Armed Forces (SAF), and incited them to attack and commit massive crimes against the civilian population. Ali Kushayb was a key part of that system, personally delivering arms and leading attacks against villages. Acting together, they committed murder, persecution, forcible transfer of population, inhumane acts, imprisonment or severe deprivation of liberty, torture, rape, outrage upon personal dignity, attacks against the civilian population, destruction of property, and pillaging.
5. On 27 April 2007 Pre Trial Chamber I issued an arrest warrant for 51 counts of crimes against humanity and war crimes against the two individuals.
6. The Prosecutor then continued to inform the Security Council of its other investigations. In the June 2007 and December 2007 reports to the Council, it is stated that the Prosecution was investigating an ongoing pattern of crimes committed with the mobilization of the whole state apparatus and it was highlighted that "*Harun's presence in the Ministry of Humanitarian Affairs and the other high profile responsibilities he is being given by the GoS signals official tolerance or even active support for his crimes. GoS officials have decided...to protect and promote Ahmad Harun*". The Prosecution announced that the second case would focus on the persons protecting Harun and ordering the continuing attacks aimed at the Fur, Masalit and Zaghawa, and would be presented to the Judges by July 2008.

7. On 14 July 2008, the Prosecution presented its evidence to Pre-Trial Chamber I, requesting an arrest warrant against President Omar Al Bashir for 10 charges of genocide, crimes against humanity and war crimes. The Prosecution submitted that President Al Bashir used the state apparatus to commit massive crimes in Darfur. He ordered that the SAF, acting in concert with the Militia/*Janjaweed*, attack hundreds of villages predominantly inhabited by the Fur, Masalit and Zaghawa. As a consequence 2.5 million people were forced to live in camps for internally displaced people. The Prosecution presented evidence showing that President Al Bashir was subjecting these 2.5 million people to conditions of life calculated to bring about their physical destruction, including through rapes and hindering humanitarian aid.
8. On 4 March 2009, Pre Trial chamber I issued an arrest warrant for President Al Bashir for 5 counts of crimes against humanity including the crimes of extermination, rapes and killings, and 2 counts of war crimes, intentionally directing attacks against a civilian population as such or against individual civilians not taking part in hostilities and pillaging.
9. On 6 July 2009, the Prosecution appealed the decision of the Majority because it did not retain the genocide charges.
10. On 3 February 2010, the Appeals Chamber found that the Pre-Trial Chamber applied an erroneous standard of proof and directed the Pre-Trial Chamber to decide on the basis of the correct standard of proof whether a warrant of arrest for genocide should be issued.
11. In the Haskanita case, on 20 November 2008, the Prosecution presented its evidence against three rebel commanders comprising 3 charges of war crimes. The application focused on an unlawful attack carried out on 29 September 2007 against African Union Mission in Sudan (AMIS) peacekeeping personnel, installations, material, units and vehicles, stationed at the Military Group Site Haskanita, North Darfur. The rebel commanders were charged with the war crimes of violence to life, intentionally directing attacks against personnel, installations, material, units or vehicles involved in a peacekeeping mission, and pillaging under Art. 8 (2) of the Rome Statute. The attackers killed twelve peacekeepers and severely wounded eight others. In addition, they destroyed the communications installations, dormitories, vehicles and other AMIS materials. After the attack, the commanders personally participated in pillaging the camp.
12. On 8 February 2010 the Pre Trial Chamber I declined to confirm the charges. The Prosecution will present new evidence.
13. UNSC Resolution 1593 requested the Government of the Sudan (GoS) and other parties to the conflict to cooperate with the work of the Court. Abu Garda, a rebel commander has done so and has appeared freely in Court. As to the Government of the Sudan, as previously reported, since 2007 and as of the date of this report, it has ceased all cooperation with the Court and has not complied with the decisions of the UN Security Council.
14. On 19 April 2010, as detailed below, the Prosecution submitted to the Pre-Trial Chamber a request for a finding of non-cooperation of the Government of the Sudan in the case of *The Prosecutor v. Ahmad Harun and Ali Kushayb*, pursuant to Article 87 of the Rome Statute.

15. On 25 May 2010, the Pre-Trial Chamber issued its “Decision informing the United Nations Security Council about the lack of cooperation by the Republic of the Sudan”.

Investigative and Prosecutorial activities - Proceedings

Prosecutor vs Harun and Kushayb

16. The arrest warrants for Ahmad Harun and Ali Kushayb were issued by the Pre-Trial Chamber of the International Criminal Court on 27 April 2007, more than three years ago. The Court directed the Registrar to transmit the warrants of arrest and the implementation requests to the GoS, neighbouring States, all Rome Statute States Parties and all UNSC members. The request was transmitted to and received by the Sudan on 16 June 2007.
17. As of the date of this report, the two individuals have not yet been arrested and transferred to the Court by the Sudanese authorities.
18. On 19 April 2010, the Prosecution submitted to the Pre-Trial Chamber a request for a finding of non-cooperation of the Government of the Sudan in the case of *The Prosecutor v. Ahmad Harun and Ali Kushayb*, pursuant to Article 87 of the Rome Statute. The filing notified the Chamber of continued lack of GoS cooperation. It includes information on the Sudanese authorities’ official statements reiterating refusal to cooperate, on the protection and promotion of Ahmad Harun and Ali Kushayb, on the attacks and threats against persons and organizations accused of cooperating with the Court. The filing also documents how the lack of arrest of the two individuals contributes to the continuation of crimes.
19. Article 87 of the Rome Statute provides that the Court may render a finding on non-cooperation and notify its decision to the ICC President for transmission to the United Nations Security Council (UNSC) and, if so decided, to the Assembly of States Parties.
20. The process mirrors ICTY and ICTR rules as well as their experience in reporting state non-cooperation to the UNSC. Rule 7 *bis* of the ICTY Rules of Procedure and Evidence creates a procedure by which an ICTY Chamber, a Judge or the Prosecutor may raise the matter with the President of the Court who shall then notify the UNSC. ICTY and ICTR jurisprudence is relevant because both *ad hoc* tribunals were created through UNSC resolutions on the basis of Chapter VII of the UN Charter, the same basis as UNSCR 1593, which gave the ICC jurisdiction over Darfur.
21. In accordance with ICTY jurisprudence, as long as (i) the Court has taken reasonable steps (recourse to the appropriate authorities of the State in whose territory the accused resides, publicity of the warrant) to secure the appearance of the person, (ii) the requested State has been given sufficient time for compliance and (iii) the request is identifiable, there is no justification for continued non-cooperation.
22. The Chamber may take into consideration the question of prior cooperation in order to assess whether current non-cooperation is in bad faith or is intended to impede the fair and expeditious conduct of proceedings.
23. In the instant case, previous GoS cooperation demonstrates that when willing, the Sudanese authorities are able to provide diverse forms of cooperation. The Office has

experienced a cooperative relationship in the past with the GoS. In another case before the Court, *The Prosecutor vs Kony et al*, the GoS signed an agreement with the Office on 2 October 2005 on the arrest of the leaders of the Lord's Resistance Army (LRA) who are the objects of ICC arrest warrants. In November 2005, representatives of the ICC visited Khartoum to discuss matters relating both to the LRA and the situation in Darfur.

24. Since 2005, following the opening of the Darfur investigation, the Office has endeavoured to establish a similar constructive working relationship with the GoS, and has received a degree of cooperation up to June 2007 when the GoS accepted the notification of the arrest warrant.
25. Judicial records and other documents were shared under Article 53 of the Rome Statute, including the report of the Sudanese National Commission of Inquiry and the report from the Sudanese Ministry of Defence on its operations, GoS officials were interviewed in Khartoum under Article 55 of the Rome Statute as potential witnesses, and 5 missions were undertaken to Khartoum, the last in January/February 2007.
26. For two months after the request for arrest warrants for Ahmad Harun and Ali Kushayb, the GoS considered continuing to cooperate, with a cabinet committee considering the issue, and with no public indication that cooperation would end.
27. However, by mid-April 2007, a decision was made and a document posted on the official website of the Ministry of Foreign Affairs, indicating the intention not to cooperate further with the Court. On 12 April 2007, the Office sent a letter to the GoS requesting clarification on the status of the abovementioned document, and on its reaction to the filing. The GoS sent no written response but GoS representatives made a number of public statements that the GoS would no longer cooperate with the Court.
28. Since June 2007, although the Prosecution and many international actors have taken every opportunity to encourage the Sudanese authorities, and the persons against whom arrest warrants are sought, to engage in the judicial process, cooperation has been completely lacking.
29. The UNSC itself attempted to secure cooperation, including during its visit to Khartoum from 16-17 June 2007.
30. Moreover, in June 2008, the UNSC adopted Presidential Statement 21 which "*recalls its decision, under Chapter VII of the United Nations Charter, in resolution 1593 (2005) that the Government of Sudan and all other parties to the conflict in Darfur shall co-operate fully with and provide any necessary assistance to the International Criminal Court and the Prosecutor pursuant to that resolution, while stressing the principle of complementarity of the International Criminal Court; (...) takes note of the efforts made by the Prosecutor of the International Criminal Court to bring to justice the perpetrators of war crimes and crimes against humanity in Darfur and in particular notes the follow up by the International Criminal Court with the Government of Sudan, including the transmittal by the Registry of the International Criminal Court to the Government of Sudan on 16 June 2007 of arrest warrants and the opening by the Prosecutor of other investigations on crimes committed by various parties in Darfur, [and] in this respect, [and] (...) urges the Government of Sudan and all other parties to the conflict in Darfur to*

cooperate fully with the Court, consistent with resolution 1593 (2005), in order to put an end to impunity for the crimes committed in Darfur.”

31. Presidential Statement 21 was adopted two years ago and referred explicitly to the transmission of the arrest warrants against Harun and Kushayb, urging the GoS to “cooperate fully and provide any necessary assistance”. But the GoS has not heeded the UNSC requests.
32. On 25 May 2010, the Pre-Trial Chamber issued its “Decision informing the United Nations Security Council about the lack of cooperation by the Republic of the Sudan.” In the public decision, the Pre-Trial Chamber considers “*that the obligation of the Republic of the Sudan to cooperate with the Court stems directly from the Charter of the United Nations and Resolution 1593...*”, and that “*all possible measures [have been taken] to ensure the cooperation of the Republic of the Sudan*”.
33. The Chamber concludes that “*the Republic of the Sudan is failing to comply with its cooperation obligations stemming from Resolution 1593 (2005) in relation to the enforcement of the warrants of arrest issued by the Chamber against Ahmad Harun and Ali Kushayb.*” The Chamber indicates that “*this is without prejudice to other decisions or actions that the Chamber may take in respect of other cases arising in the situation in Darfur.*” Finally the Chamber orders the Registrar to transmit “*the present decision to the Security Council, through the Secretary General of the United Nations, in order for the Security Council to take any action it may deem appropriate.*”

Prosecutor vs Omar Al Bashir

34. The arrest warrant for President Al Bashir was issued by the Court on 4 March 2009, for 5 counts of crimes against humanity including the crimes of extermination, rapes and killings, and 2 counts of war crimes, intentionally directing attacks against a civilian population as such or against individual civilians not taking part in hostilities and pillaging.
35. On 6 July 2009, the Prosecution appealed the decision of the Majority because it did not retain the genocide charges. The Prosecution submitted that the Majority applied the wrong legal test to draw inferences for determining “*reasonable grounds*” under Article 58 of the Rome Statute and imposed on the Prosecution an evidentiary burden inappropriate for this procedural stage.
36. On 3 February 2010, the Appeals Chamber issued a Judgment on the Prosecutor’s appeal against the “Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir.” The Appeal Chamber found that the Pre-Trial Chamber applied an erroneous standard of proof and directed the Pre-Trial Chamber to decide on the basis of the correct standard of proof whether a warrant of arrest for genocide should be issued.
37. The Pre-Trial reconsideration process does not include nor does it have any suspensive effect on the warrant already issued for crimes against humanity and war crimes.

Prosecutor vs Abu Garda

38. On 8 February 2010, Pre-Trial Chamber I issued its Decision on the Confirmation of Charges in the case of Bahar Idriss Abu Garda.
39. In its 20 November 2008 application, the Prosecution had alleged that Mr. Abu Garda was individually criminally responsible as a co-perpetrator or as an indirect co-perpetrator for war crimes. In particular, the Prosecution alleged the existence of a common plan to attack the African Union Mission in Sudan ("AMIS") at the Military Group Site Haskanita ("*the MGS Haskanita*"), agreed to by Mr. Abu Garda and other senior commanders during meetings held before the attack. The Prosecution alleged further that Mr. Abu Garda played an overall essential coordinating role and had direct responsibilities in the implementation of that common plan which led to the commission of the alleged crimes.
40. In its decision, the Pre-Trial Chamber did agree with the Prosecution that the Haskanita attack reached the gravity threshold under the Statute. They stated that, "*in assessing the gravity of a case, 'the issues of the nature, manner and impact of the [alleged] attack are critical.'*" Further, *the gravity of a given case should not be assessed only from a quantitative perspective, i.e. by considering the number of victims; rather, the qualitative dimension of the crime should also be taken into consideration when assessing the gravity of a given case.*"
41. The Chamber noted that, as a result of the alleged attack, killings and pillaging in the MGS Haskanita, AMIS operations were severely disrupted, thus affecting its mandated protective roles with respect to millions of Darfurian civilians in need of humanitarian aid and security. The Chamber found that the consequences of the attack were grave for the direct victims of the attack, that is, the AMIS personnel, and for their families. In addition, the Chamber stressed that ultimate reduction of AMIS activities in the area as a result of the attack had a grave impact on the local population.
42. In relation to the protected status of the peacekeepers, the Pre-Trial Chamber concluded that personnel, installations, material, units or vehicles involved were not military objectives, and thus were entitled to the protection given to civilian objects.
43. However, the Chamber declined to confirm the charges, on the grounds that that the Prosecution's evidence did not establish substantial grounds to believe that Abu Garda could be held criminally responsible as a direct or indirect co-perpetrator, or under any other form of liability.
44. On 15 March the Prosecution sought leave to appeal the Chamber's decision that Mr. Abu Garda has no criminal responsibility.
45. In its 23 April decision on the "Prosecution's Application for Leave to Appeal the 'Decision on the Confirmation of Charges,'" the Pre-Trial Chamber rejected the Prosecution's application.
46. The Prosecution continues to collect new evidence and will bring it to the Pre-Trial Chamber to seek a new confirmation hearing pursuant to Article 61(8).

Other individuals named in the Haskanita case

47. In its November 2008 Application, the Prosecution named three individuals. The Prosecution has continued to pursue efforts in regard of the two remaining individuals and will further report in December 2010 to the UNSC.

National and other efforts to promote accountability

Admissibility of the cases

48. The Pre-Trial Chamber found that the three cases presented by the Prosecution in the Darfur situation were admissible, on the grounds that there were no relevant national proceedings.

49. In accordance with the Rome Statute and with UNSCR 1593, in which the Council “*encouraged the Court as appropriate and in accordance with the Rome Statute, to support international cooperation with domestic efforts to promote the rule of law, protect human rights and combat impunity in Darfur*”, the Prosecution has continued to assess whether the three cases of the Prosecution has pursued have or may be addressed by the national judicial system.

50. The reports by the Government of the Sudan itself to the African Union Commission dated September 2008 and February 2009, and forwarded to this Council confirmed that only seven cases had been completed by the end of 2005 by the Darfur Special Court. None of those seven cases addressed the systematic pattern of crimes committed in Darfur. The cases tried were chosen from the files of the ordinary courts and related to ordinary crimes with no relation with the Court proceedings.

51. In addition, there are consistent reports that Sudanese suspected of having information on crimes are threatened by the Sudanese security services.

52. The ability of the Sudanese judicial system to carry out proceedings has been demonstrated *inter alia* by the decision, announced on 6 May by GoS Justice Minister Abdel-Basit Sabdarat, to prosecute those responsible for investment fraud of up to \$175 million in North Darfur. Minister Sabdarat announced that 58 suspects had been taken into custody and would face criminal charges, including two ex-police officers. The case shows that GoS authorities can prosecute serious crimes where there is willingness to do so. The Prosecution hopes to see similar action for war crimes, crimes against humanity and genocide.

Complementary accountability efforts

53. Others, in particular the African Union (AU) High-Level Implementation Panel, chaired by former South African President Thabo Mbeki, have followed up on their efforts to promote justice mechanisms to supplement the work of the ICC and to try to close the impunity gap.

54. The “*independent High-Level Panel made up of distinguished Africans of high integrity*” was established by the AU in July 2008 to address “*the inter-linked issues of combating impunity and promoting peace, reconciliation*”.

55. At the Panel's request, the Prosecution submitted written observations to the Panel and on 7 July 2009 the Prosecutor was received by the full Panel at the headquarters of the African Union in Addis Ababa. Together they held a half day dialogue to further clarify the type of crimes investigated by the ICC, its focus on those most responsible and the role of other Courts and mechanisms to further investigate other perpetrators.
56. In its report, the Panel notes that *"As a result of the failings of the State in dealing with the grave situation in Darfur, faith in the criminal justice system has been severely eroded. To restore confidence and prevent impunity, a root and branch change will be required. In particular, it will be necessary to establish an integrated system of accountability consisting of various measures and institutions working together to deal with the full range of abuses and violations that have been committed during the conflict."* The report was adopted unanimously on 29 October 2009 at a High-Level meeting of the AU Peace and Security Council in Abuja.
57. In a statement on 23 March 2010, President Mbeki reiterated the Panel's consistent position about the complementary work of the ICC and the AU High-Level Implementation Panel, stating *"there is a perfect understanding between ourselves—the Panel—and the International Criminal Court."* In relation to the Prosecution's work on Darfur, he added, *"the ICC had issued a number of warrants with regard to Sudan, that we should then take that particular matter of the fact of those warrants as given because the only way that anybody could change that would be to approach the court to get the Judges to change their minds about that, so [the Prosecutor's] suggestion was that we've got to take that as given but understand then that it is not possible for the International Criminal Court to deal with the totality of crimes that might have been committed in Darfur and therefore that it would be important for the Panel to look at what needed to be done domestically in Sudan, to address all of these crimes... so the burden would really basically fall on the national system. So we discussed the matter in that context and made various suggestions about justice and reconciliation, including suggestions which are directed at addressing the problem that a lot of the population in Darfur has no confidence in the independence of the Sudanese judiciary, and therefore we had to make suggestions as to how justice might be done in a way that would inspire confidence in victims, hence the idea of the hybrid court and so on, to bring in judges from outside, the judges, prosecutors and investigators from outside Sudan."*
58. The Prosecution acknowledges that President Mbeki and the Panel have a crucial role to play, to ensure accountability at all levels and restore victims' confidence. The AU and the League of Arab States, in addition to the UN and other international actors, have endeavoured for years to help to ensure that the necessary political support and financial and judicial resources are in place to end impunity in Darfur. Engaging the GoS in implementation of the elements relating to national proceedings in the Mbeki Panel recommendations and in the July 2008 Arab League solution package are important steps toward ending crimes in Darfur.

Cooperation including for the enforcement of arrest warrants

59. Under UNSCR 1593, the Security 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 such decision and to the Judges' orders, the Court's arrest warrants have been transmitted to the GoS.

60. The GoS, as the territorial State, has the primary responsibility and is fully able to implement the warrants, with no external interference and consistent with its sovereign authority. It has not done so.
61. As the Prosecutor stated in his address to the Council in December 2009, *“I will deal with any judicial challenge brought by President Al Bashir and other suspects in Court. But I will need the full support of the Council to ensure that the attention remains on the need to arrest the persons who are the object of arrest warrants and on the need to end crimes in Darfur.”*
62. Many States, both Parties and non Parties of the Rome Statute, following the decisions of this Council, have taken steps to isolate and ultimately facilitate the surrender of the individuals sought by the Court. They have refrained from political support or financial aid to any individual subject of an arrest warrant or to those protecting them. They have severed all non-essential contacts with those subject to ICC warrants. This is a positive development and the Security Council has the opportunity to enlarge this collective effort.
63. In particular, over the next months, the UNSC can act upon UNSC 1593 and Presidential Statement 21 to secure the cooperation for the arrest of Ali Kushayb and Ahmad Harun. The Prosecution understands that the Council can accomplish this under various mechanisms including the existing UNSCR 1591 regime. UNSCR 1591, para 3(c) provides for application of these measures to individuals *“who (...) commit violations of international humanitarian or human rights law or other atrocities.”* The UNSCR 1591 regime has already been put into practice through UNSCR 1672, which added four names of individuals to be subject to the measures set out in UNSCR 1591, namely freezing all funds, other financial assets and economic resources owned or controlled by the individuals in question.
64. This Council has dealt before with the non compliance of States in relation to the enforcement of arrest warrants. In the case of the ICTY, Presidential Statement of August 8, 1996 raised the prospect of economic sanctions in the event of continued non-compliance with the orders of the ICTY. In UNSC 1088 (1996), the Council threatened to discontinue international financial aid in the face of lack of compliance with the Tribunal’s orders. In its preamble, UNSC 1503 (2003) urged *“Member States to consider imposing measures against individuals and groups or organizations assisting indictees at large to continue to evade justice, including measures designed to restrict the travel and freeze the assets of such individuals, groups or organizations.”*
65. The legal framework for cooperation established by the Security Council through UNSCR 1593 and Presidential Statement 21 is clear. The failure to arrest Ahmad Harun and Ali Kushayb sends a signal that impunity will not only be tolerated, it will be encouraged. The Prosecution can only echo the words of ICTY President McDonald who in her October 1998 address to the Council, noted that *“almost three years after their indictment and the issuance of arrest warrants...the three accused [President Milosevic, President Karadzic and Mladic]...remain at liberty...This international non-compliance has far-reaching consequences for international peace and security. No State should be permitted to act as if it is ‘above the law.’ Such transgression is not only unlawful, but importantly sends a message to other States that the measures adopted by the Security Council can be ignored...There comes a time when such defiance cannot be ignored. That time is now.”*

66. The means to act are entirely within the UNSC's remit. The Prosecution would however urge the UNSC to focus first on individual measures in relation to Kushayb and Harun, in particular the identification and freezing of their assets.

Analysis of crimes committed in the last six months

67. In the last briefing, the Prosecution indicated that the Office continues to review information in four areas: (i) Acts affecting the persons displaced, committed in particular by the Humanitarian Aid Commission (HAC); (ii) acts against civilians in the camps, including rapes, by the forces of President Al Bashir; (iii) the use of child soldiers and (iv) the criminal responsibility of Sudanese officials who actively deny and dissimulate crimes.

68. The Prosecution notes that a number of officials allegedly involved in the commission and concealment of crimes have been removed from their posts, including *inter alia* Humanitarian Aid Commissioner Mohamed Abdel-Rahman Hasabo, who was involved in the hindering of humanitarian assistance and was wanted by the Prosecution for questioning.

69. The Office was also monitoring the spill over of attacks against the civilians in Chad. It notes however recent efforts by the GoS and the Chadian government to avoid such extension of the violence.

70. As documented below, crimes continue in Darfur in the following areas: attacks on civilians, the imposition of conditions of life aimed at the destruction of communities including attacks on personnel mandated to protect civilians and forced returns, the recruitment of child soldiers and sexual violence.

Attacks against civilians

71. The UN Committee tasked by UNSCR 1591 considered the report of its Panel of Experts on 8 January 2010. The Panel of Experts expresses serious concerns about the lack of reporting on crimes in Darfur. In the first place, *“the Panel would like to highlight further how independent monitoring in Darfur is not guaranteed owing to interventions by the Government of the Sudan. For example, no UNAMID movement is permitted without approval by the Government of the Sudan. Its control is comprehensive and if a particular UNAMID flight is not given clearance the Panel will not learn the true reasons.”*

72. The Panel touched on the effects of *“retribution perpetrated against Darfurians on the ground of political opinion or affiliation,”* which it described as having *“resulted in the curtailment of freedom of expression among Darfurians.”* The Panel added that *“Internally displaced persons who have been victimized fear telling their stories or speaking out against the Government of the Sudan or rebel groups, owing to the harassment and at times violence they have experienced as a result of speaking out. This sentiment has been expressed by community leaders of the internally displaced throughout Darfur.”* The arrest in Kass, reported by Radio Dabanga, of Sheikh Abakr Shata, leader of Erli displaced camp, on 10 May is an example of the kind of ill treatment and harassment that the displaced fear.

73. The Panel noted that *“Government intimidation escalated considerably after the expulsion of the international non-governmental organizations in March 2009. Representatives of international organizations are currently guarding against the threat of being declared persona non grata.”*
74. The 28 April 2010 report of the UN Secretary General notes that *“UNAMID documented 37 cases of arbitrary arrest and detention, 14 of which were conducted by the National Intelligence and Security Service, 17 by Military Intelligence, 5 by the Sudanese Armed Forces and 2 by the Minni Minnawi faction of SLA. The powers of arrest and detention granted to the Service and to Military Intelligence continue to be an issue of concern, particularly regarding the enjoyment of the right to fair trial and due process.”*
75. President Al Bashir declared the Darfur conflict over after a ceasefire signed with JEM in Doha in February. On the same day, the GoS Army attacked the Jebel Marra region. Over fifty civilians were reportedly killed during the aerial bombardment. Aid groups suspended operations because of the fighting that caused the flight of 100,000 people. Hundreds of civilians were feared dead in the clashes.
76. Other attacks constituting violations of the ceasefire agreement, including aerial bombardments around the North Darfur areas of Abu Hamra, Furawiya and Jabel Moon, which were reported as late as April and May 2010 have affected the civilians. It is worth recalling that the aerial bombardments and the use of Janjaweed/Militia as reserve forces against civilians have been documented and considered as crimes against humanity and war crimes by the Judges of the International Criminal Court, in their decisions in relation to Harun, Ali Kushayb and President Al Bashir. In its decision to issue a warrant for President Al Bashir, *“the Chamber [found] that there [were] reasonable grounds to believe that the above-mentioned attack was systematic as it lasted for well over five years and the acts of violence of which it was comprised followed, to a considerable extent, a similar pattern. For instance, attacks on towns and villages inhabited mainly by members of the Fur, Masalit and Zaghawa groups are consistently described in the materials provided by the Prosecution as coordinated ground attacks in which the attackers had previously encircled the targeted village or came to such village with tens or hundreds of vehicles and camels, forming a sort of wide line. Moreover, such materials also refer to the fact that such ground attacks were often preceded by aerial bombings by planes bearing the markings or indications of the State of Sudan, and that Janjaweed Militia arrived on horse or camel-back along with, or shortly followed by, members of the Sudanese Armed Forces in motor vehicles.”*
77. The 28 April 2010 report of the UNSG notes that while exact numbers of casualties and displaced persons have not been confirmed, the humanitarian community has estimated that approximately 2,000 households have been displaced to Nertiti, West Darfur, as a result of violence, and the GoS Humanitarian Aid Commission estimates that 600 households have been displaced to Thur and 1,760 households to Guildo, West Darfur. Newly displaced individuals in the Hassa Hissa camp in Zalingei, West Darfur, reported that their villages, east of Golo in Jebel Marra, had come under aerial bombardment and ground attack on 24 February 2010 by armed men in uniforms who had indiscriminately opened fire on civilians. UNAMID has been unable to verify those claims.

78. Attacks on peacekeepers and humanitarian workers continue; the killing of 2 Egyptian peacekeepers on 7 May near Katila village, South Darfur, brings to 24 the number of UNAMID personnel killed since UNAMID began deploying in January 2008.
79. This number includes five Rwandan peacekeepers killed in North Darfur on 6 December; the Rwandan Defence Force (RDF) spokesman, Major Jill Rutaremara, stated there was no known rebel activity in the area, and further stressed “*The proximity of the ambush to the checkpoint manned by the government forces raises some questions. The only logical conclusion the RDF can make is that the RDF Peacekeepers were killed and injured by the government forces.*”
80. On 25 March, UN DPKO head Alain Le Roy called for a full investigation of a 5 March ambush of 63 UNAMID peacekeepers in the Jebel Marra area of Darfur, calling the event “*a very grave and serious incident.*”
81. In his 28 April 2010 report, the UN Secretary-General recalled these incidents and others in highlighting that “*the risks posed to the safety and security of United Nations and associated personnel continue to be of grave concern.*” UNAMID head Ibrahim Gamberi echoed the Secretary-General in saying on 20 May, “*it is with great concern that I must report that UN and humanitarian personnel continue to be a target of attacks and criminal acts. To thwart future recurrences of such incidents I have given firm instructions to our troops and police contingents to respond more robustly to attacks. I have also made it clear in all my engagements that such attacks constitute war crimes.*”

Deprivation of humanitarian aid

82. While UN and others strive to deliver food and non food items in the wake of NGO expulsions, the sustainability and quality of distribution, monitoring and evaluation is most critical. A UN humanitarian official in Sudan warned on 19 April that increasing violence had cut off aid deliveries to the mountainous area of Jebel Marra and the living situation for the estimated 100,000 people there would worsen as the dry season comes to an end.
83. The 28 April 2010 report of the UN Secretary-General called humanitarian access in these areas “*uneven and, in some cases, restricted owing to renewed fighting in eastern Jebel Marra and Jebel Moon... Currently no health services are available, and important gaps are likely to exist in water and sanitation services and livelihood/agricultural assistance. United Nations agencies and non-governmental organizations have reinforced their preparedness, but, until access is granted, the assessment of needs and the delivery of aid will remain limited.*” A UN inter-agency assessment mission to South Darfur found that several thousand people uprooted from their homes by clashes in March had remained displaced.
84. In the same report, the UN Secretary-General confirmed that approximately 1.35 million internally displaced are out of reach, noting the “*availability of a safe water supply was ensured for more than 1.2 million internally displaced persons*” out of approximately 2.6 million displaced.

Child soldiers

85. The Prosecution continues to be concerned about the use of child soldiers in Darfur but notes with interest reported progress on the issue in the UNSG's 28 April 2010 report, which states that "*UNAMID entered into dialogue with the parties to the conflict with a view to securing commitments to action plans aimed at ending the recruitment and use of child soldiers. The leadership of the armed groups —SLA-Free Will, JEM-Peace Wing and SLA-Abu Gasim — agreed to enter into action plans with the United Nations. The armed groups raised concerns that children who were released might be re-recruited by rival factions, and urged that the support provided for the rehabilitation and reintegration programmes for former child soldiers be extended to other children affected by the armed conflict. During the reporting period 574 children associated with JEM-Peace Wing, SLA Peace Wing and the Movement of Popular Forces for Rights and Democracy were released and demobilized. This brought to 957 the total number of children associated with the armed groups released thus far, out of the 2,000 children registered for release.*"

Violence against women

86. Both decisions by the Judges in relation to Harun and Kushayb and in relation to President Al Bashir have retained charges of sexual crimes. Yet, sexual crimes remain unabated in Darfur. In its 8 January 2010 report, the UN Committee tasked by UNSCR 1591 reported that "*Most of the major armed actors in the Darfur conflict had continued to exercise their military options, violate the Security Council arms embargo and international humanitarian and human rights law, and impede the peace process. The Panel found that the Darfurian population continued to be affected by attacks and counter-attacks involving most of the armed movements, which frequently led to the disproportionate use of force by the Sudanese Armed Forces and their auxiliary forces, and resulted in killings, injuries and displacements. The Panel also found that the women of Darfur continued to suffer from all forms of gender-based violence.*"

87. The Panel of Experts noted that "*According to internally displaced persons, perpetrators of sexual and gender-based violence are often members of Arab militia, Government of the Sudan armed forces, signatory and non-signatory rebel groups, and Chadian armed opposition groups. They carry out physical and sexual assault, rape, threaten and shoot women with their weapons, beat them and rob them of their possessions.*" In this context, the publication of statements by the President of the Sudan from mid-2004 that it was an honour for women of Darfur to be raped by men of his tribe have exacerbated the sense of impunity for sexual violence.

88. Of particular concern "*There appears to be an overwhelming apathy towards, and unwillingness to investigate, acts of sexual and gender-based violence. Victims and their families often refuse to contact the National Police because they distrust the police's willingness and ability to investigate cases of sexual and gender-based violence, and the burden of proof usually falls upon the victims, who must gather evidence themselves. According to Sudanese law, if the alleged perpetrator of a crime belongs to a military unit of the Government of the Sudan or any of its auxiliary units, a prosecutor would need to request from the SAF Military Legal Advisor the lifting of the immunity of the accused. The Military Legal Advisor is then expected to pass on the request to the commander of the unit to which the accused belongs and to initiate his investigation into whether the immunity of the accused should be lifted in order to facilitate a civil trial. It is at this stage*

in the administration of justice that military personnel and members of the Government of the Sudan auxiliary forces who commit sexual and gender-based violence are often afforded impunity. Requests by prosecutors to the military legal advisers of the alleged perpetrator's unit to lift immunity so as to facilitate investigations and civil trial are either ignored or are denied on the pretext of lack of sufficient evidence (...) When the Panel requested statistical data on prosecutions for sexual and gender-based violence or information on specific cases at both the national and state level, no information was made available."

89. In his 28 April 2010 report, the UN Secretary-General also noted *"ongoing reports of human rights violations—especially against women...continued. Civilians continued to experience insecurity in the form of sexual and gender-based violence. ... In an effort to strengthen prevention and response with regard to sexual and gender-based violence, UNAMID, United Nations agencies and international nongovernmental organizations initiated the development of standard operating procedures to ensure systematic coordination, the complementarity of initiatives and streamlined reporting, with a view to redefining operational strategies and filling the gap left in prevention and service provision efforts following the March 2009 expulsion of a number of international organizations working in the area."*
90. Under the Ugandan Presidency, the UNSC will hold a session at ministerial level on 29 October 2010 on the 10th anniversary of UNSCR 1325. In light of those upcoming discussions, the Prosecution would like to recall that UNSCR 1325 calls, *inter alia*, for *"measures that ensure the protection of and respect for human rights of women and girls, particularly as they relate to the constitution, the electoral system, the police and the judiciary."* The resolution further *"calls on all parties to armed conflict to take special measures to protect women and girls from gender-based violence, particularly rape and other forms of sexual abuse, and all other forms of violence in situations of armed conflict"* and *"emphasizes the responsibility of all States to put an end to impunity and to prosecute those responsible for genocide, crimes against humanity, war crimes including those relating to sexual violence against women and girls, and in this regard, stresses the need to exclude these crimes, where feasible from amnesty provisions."*
91. UNSCR 1820, adopted in 2008, builds further on the premise of UNSCR 1325, *"stress[ing] that sexual violence, when used or commissioned as a tactic of war in order to deliberately target civilians or as a part of a widespread or systematic attack against civilian populations, can significantly exacerbate situations of armed conflict and may impede the restoration of international peace and security, affirm[ing] in this regard that effective steps to prevent and respond to such acts of sexual violence can significantly contribute to the maintenance of international peace and security, and express[ing] its readiness, when considering situations on the agenda of the Council, to, where necessary, adopt appropriate steps to address widespread or systematic sexual violence."*
92. UNSCR 1820 also *"Demands the immediate and complete cessation by all parties to armed conflict of all acts of sexual violence against civilians with immediate effect; Demands that all parties to armed conflict immediately take appropriate measures to protect civilians, including women and girls, from all forms of sexual violence, which could include, inter alia, enforcing appropriate military disciplinary measures and upholding the principle of command responsibility, training troops on the categorical prohibition of all forms of sexual violence against civilians, debunking myths that fuel*

sexual violence, vetting armed and security forces to take into account past actions of rape and other forms of sexual violence, and evacuation of women and children under imminent threat of sexual violence to safety; and requests the Secretary-General, where appropriate, to encourage dialogue to address this issue in the context of broader discussions of conflict resolution between appropriate UN officials and the parties to the conflict, taking into account, inter alia, the views expressed by women of affected local communities; Notes that rape and other forms of sexual violence can constitute a war crime, a crime against humanity, or a constitutive act with respect to genocide, stresses the need for the exclusion of sexual violence crimes from amnesty provisions in the context of conflict resolution processes, and calls upon Member States to comply with their obligations for prosecuting persons responsible for such acts, to ensure that all victims of sexual violence, particularly women and girls, have equal protection under the law and equal access to justice, and stresses the importance of ending impunity for such acts as part of a comprehensive approach to seeking sustainable peace, justice, truth, and national reconciliation.”

93. These measures are particularly important in relation to Darfur, given the finding of the Panel of Experts that *“Article 29 of the [Darfur Peace] Agreement provides for the reform of selected security institutions and the disarmament, demobilization and reintegration of combatants. Article 23 stipulates that the protection of the civilian population should be given the highest priority and particularly that women and children should not be subjected to gender-based violence. The lack so far of any credible reform of Sudanese security organizations, the lack of disarmament and reintegration of former combatants and the failure to establish functional institutions specialized in the prevention of sexual and gender-based violence are impediments to the political process.”*
94. As it prepares for the anniversary of resolution 1325 and for its special session of October 2010, the Council can take important measures, to ensure that Ahmad Harun and Ali Kushayb, both charged with crimes of sexual violence as war crimes and crimes against humanity, are subject to individual measures that will isolate them, ultimately ensure their arrest and surrender, and send the message to the victims in Darfur that the UN Security Council is protecting them.