



**SECOND REPORT OF THE PROSECUTOR OF THE
INTERNATIONAL CRIMINAL COURT, MR. LUIS MORENO OCAMPO,
TO THE SECURITY COUNCIL
PURSUANT TO UNSC 1593 (2005)**

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I. INTRODUCTION

The present report is submitted by the Prosecutor of the International Criminal Court pursuant to paragraph 8 of Security Council resolution 1593 (2005).

The report supplements the address given by the Prosecutor on the activities undertaken to implement UNSCR 1593 (2005) since the last report to the Council on 29 June 2005.

II. CONDUCT OF THE INVESTIGATION

On 1 June 2005 the Prosecutor determined that there is a reasonable basis to initiate an investigation into the situation in Darfur since 1 July 2002. This determination marked the commencement of the investigation and triggered the full investigative powers of the Prosecutor under the Rome Statute.

In the first phase of the investigation the Office collects information relating to the universe of crimes alleged to have taken place in Darfur, as well as the groups and individuals responsible for those crimes. The Office has made good progress in this first phase.

In the second phase of the investigation the Prosecutor will select specific cases for prosecution unless he considers, in accordance with article 53(2) of the Statute, that there is not a sufficient basis for prosecution because:

- i. There is an insufficient legal or factual basis to seek a warrant or summons under article 58;
- ii. The case is inadmissible under article 17; or

- iii. A prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of the victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime.

To carry out its investigation the Office has completed the recruitment of a multi-disciplinary team and has developed the essential infrastructure for the management and analysis of large quantities of information and evidence. The core team comprises 26 individuals, representing 19 nationalities, performing a wide variety of prosecutorial, investigative, analytical and cooperation related functions. The Office is also addressing the challenge of identifying and training impartial and effective interpretation and translation services through contacts with states and organisations, as well as missions to identify staff and resources. This is a core requirement for the Darfur situation, where documentary and oral evidence originates in a variety of languages and dialects.

Process of Identification of Crimes within the Jurisdiction of the Court

As indicated in the previous report to the Council, in accordance with the policies and strategies of the Office, the investigation will focus on a selected number of criminal incidents and those persons bearing greatest responsibility for those incidents.

Accordingly, the Office has collated as comprehensive a picture as possible of the crimes allegedly committed in Darfur since 1 July 2002. The information and evidence collected in relation to the alleged crimes is stored in a Darfur Crime Database, which also serves as an analytical tool. From this over-all picture the Office has identified particularly grave events, involving, for example, high numbers of killings, mass rapes and other forms of extremely serious gender violence and other crimes within the jurisdiction of the Court. In addition to incidents of particular gravity, the Office has examined the geographic spread of alleged crimes, specific crime patterns, as well as issues relating to witness availability and security. Having completed this process, the Office has now selected a number of alleged criminal incidents for full investigation.

Violent incidents have continued during 2005 and remain the subject of on-going monitoring and analysis by the investigation team. During April – August 2005 there was an over-all decrease in criminal activity, with few large scale attacks. This changed in September – October 2005 with an escalation in violence, resulting in further civilian deaths. Attacks on humanitarian workers and facilities remain prevalent, including incidents involving the killing of AU peacekeepers. The impact of these crimes on the delivery of humanitarian assistance and efforts to secure peace and stability in Darfur has been recently highlighted in the November report of the UN Secretary-General on Darfur and preceding statements of the Council. In some instances these crimes may fall within the jurisdiction of the Court and, where possible, national and international organisations suffering such attacks are encouraged to take steps to record and preserve information and evidence and provide these materials to the OTP.

Process of Identification of Persons Bearing Greatest Responsibility

There continues to be a great deal of speculation around the content of the list of 51 names prepared by the International Commission of Inquiry on Darfur and the status of that list in relation to the investigations being carried out by the OTP. The list was received by the Prosecutor in April 2005, opened and resealed in the presence of the OTP Executive Committee (consisting of the Prosecutor, the two deputy Prosecutors and the Head of the Jurisdiction, Complementarity and International Cooperation Division) and remains sealed. As stated in our previous report to the Council and various public statements, the list represents the conclusions of the Commission and is in no way binding on the Prosecutor. In addition, it should also be emphasised that the activities and objectives of the Committee established pursuant to UNSCR 1591 (2005) on the Sudan and of its Panel of Experts, are entirely distinct from the work of the OTP in implementing UNSCR 1593 (2005).

The OTP will conduct its own independent investigations, in accordance with the Rome Statute and the policies of the Office, in order to identify those persons to be prosecuted by the Court. No decisions have been taken at this stage as to whom to prosecute and any decision will follow a thorough analysis of the evidence collected in the wake of a full and impartial investigation. Evidence of such participation will need to cross the high evidential thresholds set by the Statute.

Investigative Activities during the Reporting Period

Witness protection is an issue of paramount concern to the ICC. The Office, working in conjunction with the Registry Victims and Witness Unit, assesses and takes appropriate measures for the protection of witnesses, victims who appear before the Court and others who are at risk on account of testimony given by such witnesses.

As indicated above, the current security situation in Darfur remains volatile with on-going violence and attacks. The establishment of an effective system for the protection of ICC victims and witnesses is a precondition to the conduct of investigative activities in Darfur. Given the prevailing climate of insecurity and the current absence of an effective system of protection, investigative activities have so far taken place outside Darfur.

Despite these limitations significant progress has been made in the investigation. The Office has issued numerous requests for assistance including to eleven (11) states and seventeen (17) NGOs and IGOs for the provision of information and other forms of assistance. Witnesses to the crimes under investigation have been identified in seventeen (17) countries. Well over a hundred (100) potential witnesses have been screened and a number of formal statements have been taken. In addition, the Office is currently screening hundreds of other potential witnesses either directly or with the assistance of states and organisations. To facilitate this process, the Office has established a semi-permanent presence in the region, which provides logistical, security and other support to the process of witness identification and interview.

In addition, the Office has registered and analysed the more than 2,500 items collected by the International Commission of Inquiry for Darfur, identifying potential evidence and evidential leads. Documentation and other materials have been collected from witnesses and a variety of organisations.

Admissibility

As set out in the previous report, the ICC is complementary to national criminal jurisdictions and is therefore a Court of last resort which will only intervene where: 1) there is not or has not been any national investigation or prosecution of the cases selected for prosecution by the Court; or 2) where there is or has been an investigation or prosecution, but it is vitiated by an unwillingness or inability to carry out the investigation or prosecution in a genuine manner. In accordance with article 53(2)(b) of the Statute, the legal test is specific to the cases selected by the Office for prosecution, and not the state of the Sudanese justice system as a whole.

Accordingly, the Office continues to gather and assess information relating to the various mechanisms established by the Sudanese authorities in relation to crimes allegedly committed in Darfur, including the Special Court for Darfur established by decrees issued on 7 and 11 June 2005, preceding the last report of the ICC Prosecutor to the Council. At the start of the Court's work there were announcements that approximately one hundred and sixty (160) suspects had been identified for prosecution. During the past six months the Special Court has conducted six (6) trials, involving twenty-six (26) defendants. The defendants appear to include eighteen (18) low-ranking members of the armed forces, including eight (8) members of the Popular Defence Forces. The others appear to be civilians. The cases reportedly include three (3) charges of armed robbery and one (1) charge of theft of livestock, two (2) charges of possession of firearms without a licence, one (1) charge of intentional wounding, two (2) charges of murder and one (1) charge of rape. The Court has convicted thirteen (13) defendants (including one juvenile), resulting in sentences ranging from nine (9) months imprisonment to the death sentence.

In November 2005 a decree is reported to have been issued establishing two new Special Courts to sit in Geneina and Nyala. Additional prosecutors and judges have been appointed to staff these Courts. The jurisdiction of the Court is also reported to have been expanded to consider allegations of violations of international humanitarian law and the Government of the Sudan has renewed its commitment to allow access to the AU and other international monitors. In addition, various other mechanisms and committees have been established to look at aspects of the crimes in Darfur, including the centres for the elimination of

violence against women and an attorney office for Crimes against Humanity. The Government has also pointed to efforts to promote tribal reconciliation and to the proposed Darfur Conference to take place in December 2005 as efforts towards a comprehensive solution to the conflict.

The continuing insecurities in Darfur currently prohibit the establishment of an effective system for the protection of victims and witnesses. This represents a serious impediment to the conduct of effective investigations into alleged crimes in Darfur by national judicial bodies, a matter confirmed in a recent statement by the President of the Darfur Special Court. In addition, the work of the Special Court up to this point does not suggest that cases likely to be prosecuted before the International Criminal Court would be inadmissible in terms of Article 53(2)(b) of the Statute. However, the Office will continue to follow the work of the Court and any other tribunals, committees and bodies established to deal with crimes committed in Darfur and will examine whether or not these or other institutions have investigated, or are investigating, the cases to be prosecuted by the Court and whether such proceedings meet the standards of genuineness set out in article 17 of the Statute.

Interests of Justice

The Prosecutor is required, pursuant to article 53(2)(c) of the Statute to consider whether a prosecution is not in the interests of justice. In considering this factor the Prosecutor will follow the various national and international efforts to achieve peace and security, as well as the views of witnesses and victims of the crimes. In this regard, the Office has established contacts with various organisations and individuals to facilitate the collection of information relevant to this assessment.

Other Activities of the Court

Updates on the Darfur investigation and the activities of the Court have been included in the ICC report to the UN General Assembly (August 2005), the report to the Assembly of States Parties (September 2005) and various diplomatic briefings.

The ICC Coordination Council (President, Prosecutor and Registrar) have met regularly to coordinate on matters of common concern relating to Darfur, including the adoption of a common integrated strategy for external relations, public information and outreach which will be supplemented by situation specific plans. The Court has retained experts to analyse information needs in Darfur, to identify partners and develop tools for outreach.

III. COOPERATION

Paragraph 2 of UNSCR 1593 (2005) requires the Government of the Sudan and all other parties to the conflict in Darfur to cooperate fully with, and provide necessary assistance to, the Court and the Prosecutor. Other states and organisations are also urged to cooperate fully.

Paragraph 3 of UNSCR 1593 (2005) invites the Court and the African Union to discuss practical arrangements for facilitating the work of the Prosecutor and the Court, including the possibility of conducting proceedings in the region.

African Union

The Office of the Prosecutor is firmly of the view that an effective working relationship with the African Union in addressing issues of impunity in Darfur is essential to the investigation, as well as to ensuring a regional participation and perspective to the process.

In addition to the efforts to develop this relationship reported to the Council in June 2005, the ICC has continued to press for the signature of the ICC-AU relationship agreement, the text of which was finalised in May 2005.

The relationship agreement is not, however, a precondition to cooperation in relation to the Darfur situation. The Prosecutor has written in October and November 2005 to the Chairperson of the African Union seeking meetings with relevant officials to discuss the modalities for cooperation in relation to Darfur, as well as an opportunity to brief the Peace and Security Council of the AU on the activities of the

Court. In addition, the Office has had contact with AMIS in Khartoum, and intends to have further follow-up on the issue of cooperation between AMIS and the OTP before the end of the year.

The next phase of the investigation will be a decisive one, the success of which will require the full cooperation of the African Union. It is hoped that rapid progress in this relationship will be achieved in this phase.

Other States and Organisations

In addition to specific requests for assistance made to States Parties, the Prosecutor has continued to hold regular meetings with representatives of states and organisations on the Darfur situation, including the Special Representative of the European Union to the Sudan and the Special Representative of the UN Secretary General for the Sudan.

The Government of the Sudan and other Parties to the Conflict

This reporting period has seen further steps in the implementation of the Comprehensive Peace Agreement, including the establishment, on 22 September 2005, of the new Government of National Unity and the redistribution of executive positions. In the lead-up to this transition the OTP did not make formal requests for assistance to the Sudan, but contacts with the Sudanese authorities were maintained. In addition to the legal mechanisms outlined above in the admissibility section, the Sudanese Government has highlighted to the OTP the various committees established to address a variety of aspects of the transition, including legal and human rights issues and specific steps taken to address the causes of the conflict in Darfur, including the demarcation of cattle routes, land cultivation and the establishment of alternative dispute resolution committees.

As set out above, following the initiation of the investigation, the OTP has gathered information and evidence from outside the Sudan. During this initial fact-finding phase, it is vital that the Office develops a full understanding of the situation in Darfur and the context in which the alleged crimes took place.

In this regard, on 17-24 November 2005 representatives of the Office of the Prosecutor and the Registry of the ICC visited Khartoum to discuss matters related to the Lord's Resistance Army and the situation in Darfur. As part of the fact-finding process, during this visit a request for assistance was made to the Sudanese authorities to undertake several interviews that could provide an insight into the activities of all parties to the conflict in Darfur, as well as an assessment of national proceedings undertaken by the Special Courts and other relevant judicial bodies.

In response to this request Sudanese officials have agreed to organise a visit to the Sudan by the end of February 2006 by representatives of the OTP to meet with the Special Courts and other relevant judicial bodies in order to assess national proceedings in relation to alleged crimes committed in Darfur. In addition, officials also agreed that, in preparation of the other interviews, the Ministry of Defence would cooperate in establishing and submitting, by March 2006, a comprehensive report on matters to be identified in advance by the OTP. The OTP is still waiting for written confirmation of these arrangements by the Government of the Sudan.

During the reporting period the OTP has also had contacts with other parties to the conflict, including the main rebel groups. Establishing consistent liaison with the SLM/A has been hampered by divisions within the group, however the OTP will continue to open channels and offer an opportunity for all parties involved in the conflict to provide information and evidence to the Court during the next phase of the investigation.

IV. OBSERVATIONS: NEXT STEPS

The investigation of the situation in Darfur is taking place within a context of on-going violence and multiple efforts to secure peace, as well as a complex process of political transition. The Office will continue to be sensitive to these dynamics and will seek to reinforce the work of the AU, the UN, the Sudan and other states and organisations. At the same time the Office is conscious of the fact that accountability for the most serious crimes alleged to have been committed in Darfur is an essential component to effective peace and effective transition.

Having made the first steps towards a cooperative relationship, during the next phase the OTP will seek the further assistance and cooperation of the Government of the Sudan in relation to the process of fact-finding and evidence gathering. This continued cooperation will be essential to ensure that the investigation achieves a full and comprehensive understanding of the situation in Darfur and the context in which crimes were allegedly committed. The Security Council has a central role to play in this context and the OTP will keep the Council informed of developments and challenges that arise during the next phase. In parallel, efforts will continue to identify and gather evidence from outside the Sudan and will require the support and assistance of relevant states and organisations.