



**TWELFTH 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 11 June 2010, 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.

**Judicial proceedings**

3. Following the UNSC referral, the Prosecution conducted a preliminary examination in order to determine whether the Darfur situation met the legal criteria established by Article 53(1)(a)-(c) of the Rome Statute. On 1 June 2005 the Office of the Prosecutor opened an investigation into crimes committed in Darfur.
4. The Office of the Prosecutor 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, and Abdallah Banda Abakaer Nourain / Saleh Mohammed Jerbo Jamus.

*The Prosecutor v. Ahmad Harun and Ali Kushayb*

5. The Prosecution presented the case to the Pre-Trial Chamber on 27 February 2007, with evidence that Harun and Kushayb joined together to persecute and attack civilians in Darfur.
6. 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. In the warrant for Harun, the Court cited “*reasonable grounds to believe that the attacks perpetrated by the Sudanese Armed Forces and/or the Militia/Janjaweed were of a systematic or widespread nature and were directed against civilians primarily from the Fur, Zaghawa and Masalit populations pursuant to or in furtherance of a State or organizational policy consisting in attacking the civilian population.*”

7. The Court further cited “*reasonable grounds to believe that, due to his position at the Darfur Security desk and through his overall coordination and personal participation in key activities of the Security Committees, namely the recruiting, arming and funding of the Militia/Janjaweed in Darfur, Ahmad Harun intentionally contributed to the commission of [war crimes and crimes against humanity], knowing that his contribution would further the common plan carried out by the Sudanese Armed Forces and the Militia/Janjaweed, which consisted of attacking the civilian populations in Darfur.*”
8. Harun and Kushayb were not arrested by the Government of the Sudan (GoS) and on 25 May 2010, two years after the warrant was issued, the Pre-Trial Chamber adopted a decision informing the Security Council about the lack of cooperation by the Republic of the Sudan, “*considering that after taking all possible measures to ensure the cooperation of the Republic of the Sudan, 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 ordered “*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.*”

#### *The Prosecutor v. Omar Al Bashir*

9. 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 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.*” The Prosecution announced that the second case, focusing on the person(s) protecting Harun and ordering continuing attacks aimed at the Fur, Masalit and Zaghawa, would be presented to the Judges by July 2008.
10. 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 counts of genocide, crimes against humanity and war crimes. The Prosecution submitted that President Al Bashir ordered that the Sudanese armed forces (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 and then subjected to bodily and mental harm that constitute genocide in accordance with article 6(b) of the Rome Statute and to conditions of life calculated to bring about their physical destruction that constitute genocide in accordance with article 6(c) of the Rome Statute.
11. On 4 March 2009, Pre-Trial Chamber I issued an arrest warrant for President Al Bashir for 5 counts of crimes against humanity (murder, extermination, forcible transfer, torture and rape) 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).
12. The Court found “*reasonable grounds to believe that, as part of the GoS’s unlawful attack (...) and with knowledge of such attack, GoS forces subjected, throughout the*

*Darfur region, thousands of civilians, belonging primarily to the Fur, Masalit and Zaghawa groups, to acts of murder and extermination.”*

13. The Court found “*reasonable grounds to believe that... GoS forces subjected, throughout the Darfur region, (i) hundreds of thousands of civilians, belonging primarily to the Fur, Masalit and Zaghawa groups, to acts of forcible transfer; (ii) thousands of civilian women, belonging primarily to these groups, to acts of rape; and (iii) civilians, belonging primarily to the same groups, to acts of torture.*”
14. The Court found “*reasonable grounds to believe that, from soon after the April 2003 attack on El Fasher airport until 14 July 2008, GoS forces, including the Sudanese Armed Forces and their allied Janjaweed Militia, the Sudanese Police Force, the NISS and the HAC, committed crimes against humanity consisting of murder, extermination, forcible transfer, torture and rape, within the meaning of articles 7(1)(a), (b), (d), (f) and (g) respectively of the Statute, throughout the Darfur region.*”
15. By a majority vote, the Pre-Trial Chamber declined to issue an arrest warrant in relation to the genocide charges.
16. On 6 July 2009, the Prosecution appealed the decision of the Majority, arguing that the Pre-Trial Chamber erroneously applied a higher standard of proof than that required at the arrest warrant stage in relation to the genocide charges.
17. On 3 February 2010, the Appeals Chamber found in favour of the Prosecution when it held that “*the Pre-Trial Chamber applied an erroneous standard of proof when evaluating the evidence submitted by the Prosecutor and, consequently, rejected his application for a warrant of arrest in respect of the crime of genocide. Therefore, the decision by the Pre-Trial Chamber not to issue a warrant of arrest in respect of that crime was materially affected by an error of law.*” As appropriate relief, the Appeals Chamber decided that “*the matter is remanded to the Pre-Trial Chamber for a new decision, using the correct standard of proof.*”
18. As a consequence, the Pre-Trial Chamber reassessed the evidence submitted by the Prosecution and applied the correct standard of proof as directed by the Appeals Chamber. On 12 July, the Pre-Trial Chamber issued a second arrest warrant for President Al Bashir for three counts of genocide (genocide by killing, genocide by causing serious bodily or mental harm, and genocide by deliberately inflicting conditions of life calculated to bring about physical destruction).
19. The Chamber found “*reasonable grounds to believe: (i) that a core component of the GoS counter-insurgency campaign was the unlawful attack on that part of the civilian population of Darfur - belonging largely to the Fur, Masalit and Zaghawa groups - perceived by the GoS as being close to the SLM/A, the JEM and the other armed groups opposing the GoS in the ongoing armed conflict in Darfur; and (ii) that villages and towns targeted as part of the GoS's counter-insurgency campaign were selected on the basis of their ethnic composition and that towns and villages inhabited by other tribes, as well as rebel locations, were bypassed in order to attack towns and villages known to be inhabited by civilians belonging to the Fur, Masalit and Zaghawa ethnic groups.*”

20. The Chamber found “*reasonable grounds to believe that thousands of civilian women, belonging primarily to the Fur, Masalit and Zaghawa groups were subject, throughout the Darfur region, to acts of rape by GoS forces... Accordingly, the Chamber finds that there are reasonable grounds to believe that the material element of the crime of genocide by causing serious bodily or mental harm, as provided for in article 6(b) of the Statute, is fulfilled.*”
21. The Court further found “*reasonable grounds to believe that... GoS forces, including the Sudanese Armed Forces and their allied Janjaweed Militia, the Sudanese Police Force, the NISS and the HAC, committed the crimes of genocide by killing, genocide by causing serious bodily or mental harm and genocide by deliberately inflicting conditions of life calculated to bring about physical destruction, within the meaning of article 6 (a), (b) and (c) respectively of the Statute, against part of the Fur, Masalit and Zaghawa ethnic groups.*”
22. Finally, the Court found “*reasonable grounds to believe: (i) that the role of Omar Al Bashir went beyond coordinating the design and implementation of the common plan; (ii) that he was in full control of all branches of the "apparatus" of the Republic of the Sudan, including the Sudanese Armed Forces and their allied Janjaweed Militia, the Sudanese Police Force, the NISS and the HAC; and (iii) that he used such control to secure the implementation of the common plan*” and found “*reasonable grounds to believe that Omar Al Bashir acted with dolus specialis (specific intent) to destroy in part the Fur, Masalit and Zaghawa ethnic groups.*”

#### *The Haskanita case*

23. On 20 November 2008, the Prosecution presented its application for summonses to appear and supporting evidence to the Judges against three rebel commanders – Bahr Idriss Abu Garda, Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus – for 3 counts of war crimes (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).
24. 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 attackers killed twelve peacekeepers and severely wounded eight others. They destroyed the communications installations, dormitories, vehicles and other AMIS materials. After the attack, the commanders personally participated in pillaging the camp.
25. A summons to appear was issued under seal for Abu Garda on 7 May 2009 and unsealed on 17 May 2009. Abu Garda voluntarily made his initial appearance before the Court on 18 May 2009, and his confirmation of charges hearing was held on 19-29 October 2009.
26. On 8 February 2010, the Pre-Trial Chamber I declined to confirm the charges against Abu Garda, stating that the evidence was insufficient to warrant committing him for trial. The Prosecution is committed to presenting new evidence against him.

27. Summonses to appear for Banda and Jerbo were issued under seal on 27 August 2009 and unsealed on 15 June 2010. On 17 June 2010, they both appeared voluntarily before the Court.
28. On 19 October, the Prosecution and Defence made a joint filing informing the Pre-Trial Chamber that they have agreed the facts alleged by the Prosecution in its Document Containing the Charges and that the Defence shall not challenge the evidence or contest the charges, and requested the Judges to consider the charges as proven for purposes of the confirmation hearing, pursuant to Rule 69 of the Rules of Procedure and Evidence. The confirmation of charges hearing is set for 8 December 2010.

### **Monitoring of crimes**

29. At the current time, the Prosecution has not opened an investigation into a fourth case in the Darfur situation. However, as previously reported, the Prosecution continues to monitor: (a) alleged attacks against civilians by the Ministry of Defence and other persons that could be part of the ongoing acts of genocide, crimes against humanity and war crimes; (b) alleged acts affecting the persons displaced, in particular by the Humanitarian Aid Commission (HAC) that could be part of ongoing acts of genocide and crimes against humanity; and (c) the use of child soldiers by the parties including rebel movements constituting war crimes.
30. Most of the crimes described below could form part of the crimes against humanity, war crimes and genocide already adjudicated by the Judges in the cases of *Prosecutor v. Harun and Kushayb* and *Prosecutor v. Omar Al Bashir*, which are continuing; any potential developments would be related to the identification of new suspects.
31. The Prosecution has also noted that instead of stopping the crimes, members of the GoS are stopping the information about the crimes. In this regard, the information received on actual civilian casualties, victims of sexual violence and victims dying from disease or malnutrition due to the hindering of aid, is very different from information and statistics disseminated or authorized for dissemination by the GoS. Discrepancies are striking, as is the fact that UNAMID and UN agencies are not receiving from the GoS the information and support they need to adequately protect civilians. Such practice of withholding information on violence or on the humanitarian needs of a population could form part of the cover up of the crimes. In addition, acts intended to prevent international forces and agencies from protecting the population, could be part of genocide under article 6(c) as they aim to deliberately inflict on the group conditions of life calculated to bring about [a group's] physical destruction in whole or in part..

### *Bombing of civilians*

32. While the GoS has repeatedly denied using aircraft in violation of Security Council resolution 1591 (2005), a number of attacks in Jebel Marra have reportedly included aerial bombardments in August, September, and October, including on populated areas around Deribat, Jawa, and Soni. The attacks resulted in civilian deaths and injuries, mass displacement, and destruction of property.
33. On 24 September 2010, according to Darfuri sources, 14 villages in Jebel Marra were bombed and completely destroyed: Kinj, Karoo, Kindi, Taringa, Barrta, Mourtoo, Kaeir,

Souroo, Aroo, Touronga, Bouronga, Abu Horyra, Debah, Neira, and Jouri. As a result of these attacks, 57 civilians were reportedly killed and more than 5,000 others displaced.

34. It is also reported that on September 30, government Antonov airplanes and helicopters dropped bombs and rockets on the town of Jawa, setting fire to the market and killing six civilians, including the imam of the mosque. The same day, Government soldiers and militias entered the town and surrounding villages and looted civilian properties. In the first week of November, Government forces continued the attacks, targeting villages to the south of Soni.
35. On 14 November 2010, the UN Security Council adopted Resolution 1945, which extends the mandate of the UNSCR 1591 panel of experts for another year and specifically *“demand[s] that the parties to the conflict exercise restraint and cease military action of all kind, including aerial bombardments.”*

#### *Other unlawful attacks on villages*

36. The 14 July 2010 report of the UN Secretary-General as well as other UNAMID sources in particular statistics from the UN Joint Mission Analysis Centre (JMAC) indicate rising death tolls in recent months, with around 600 deaths in May 2010 alone, the deadliest month in two years, and 221 deaths occurring in June 2010.
37. On 2 September 2010, the GoS and militia/*Janjaweed* reportedly jointly attacked Tabra, a Fur village in North Darfur, with troops in Land Cruisers. A published series of interviews with survivors on 17 September documented the repetition of a pattern since the beginning of the attacks against civilians in Darfur in 2003. The reports established that: *“[M]en were rounded up by militia wearing military uniforms who rode into the market on horses and camels pretending to be buying goods before spraying the shops with gunfire. Then vehicles mounted with machine guns and carrying militia fighters appeared and rounded up some of the men, approximately 58 men and boys were executed on the ground at point blank range by Janjaweed; reportedly eighty six more were injured. Witnesses told Reuters that some men were tied with rope behind cars and dragged to their deaths.”*
38. The GoS reportedly denied UNAMID as well as humanitarian access to the area. Witnesses reportedly went to the UNAMID force in the Tawilla area, 25 km away, to ask them to come to Tabra but the peacekeepers were unable to reach Tabra until several days after the attack as, reportedly, the GoS did not provide permission to the UN commanders in El Fasher to proceed to Tabra. The UN Independent Expert on the situation of human rights in the Sudan, Mohamed Chande Othman stated that he was *“deeply disturbed about these killings which highlight the continuing deterioration of the situation in Darfur.”* He also expressed concern that UNAMID teams that were dispatched to the area to assess the situation were initially prevented from reaching the village of Tabra. This event confirms the difficulty to protect civilians in an environment where the Government itself is involved in the violence.
39. The Prosecution has received the names of those injured, killed and unaccounted for, and is further analyzing the chain of command responsibilities.

40. Every such indiscriminate attack causing the death and forced displacement of civilians ordered or authorized by the Ministry of Defence may constitute new incidents of crimes against humanity, war crimes and genocide, as already found by the ICC Judges.

#### *Gender crimes and rape*

41. As mentioned above, the Judges of the International Criminal Court have found that “...thousands of civilian women, belonging primarily to the Fur, Masalit and Zaghawa groups were subject, throughout the Darfur region, to acts of rape by GoS forces...” which constitute the “*crime of genocide by causing serious bodily or mental harm, as provided for in article 6(b) of the Statute.*”

42. In his 14 July 2010 report, the UN Secretary-General reported that Sexual and Gender-Based Violence continues and is “*generally perpetrated by men in military uniform.*” During May and June 2010, UNAMID documented 16 cases of SGBV involving 24 victims in various parts of Darfur (2 gang rapes, eight rapes, one attempted rape, one case of physical assault and four cases of harassment). The alleged perpetrators were GoS police in one case, SAF in three cases and unidentified armed men in uniform in 12 cases.” In addition, according to the same report, UNAMID received from local interlocutors information on sexual violence committed by SAF and other armed men in unidentified military attire during military operations around Jebel Moon. Due to lack of access, UNAMID could not act upon this allegation. Overall, the lack of accountability continues to create an environment conducive to perpetration of sexual violence.

43. In September 2010, in and around Kassab camp, it was reported that “*The refugees... complained about the escalation of rape around the camp, especially after Eid Al Fitr, the holiday marking the end of the fasting month of Ramadan. According to sources in the camp, a large number of women have been raped including even a woman in her seventies. Displaced women living in the camp are in a state of panic and fear because of these incidents.*”

44. On 17 September 2010, UN Independent Expert Mohamed Chande Othman, reported to the UN Human Rights Council that “*women and young girls continue to experience insecurity as a result of sexual and gender based violence. Police inaction in conducting thorough investigation into reported cases continues to foster a climate of impunity.*” The 18 October UN Secretary-General’s report cites “*the difficulties faced by victims in proving they were raped*” as preventing reporting of rapes.

#### *Imposition of conditions of life intended to cause destruction*

45. As mentioned above, the Judges of the International Criminal Court issued an arrest warrant for genocide under article 6(c) for “*Deliberately inflicting on the group conditions of life calculated to bring about the physical destruction in whole or in part.*”

46. Denial of humanitarian access directly affects the persons displaced. On 12 June 2010, after a 4 day visit to Sudan, European Commissioner for International Cooperation, Humanitarian Aid and Crisis Response, Kristalina Georgieva, said that the GoS had turned down 26 of more than 30 recent requests for aid road trips in South Darfur. Flights were also being blocked, she said: “*We are calling on the government to allow the Red Cross and other humanitarian organisations that are key to get into more remote*

areas,” she said. “One in five or one in six requests were granted... They have to shift more towards access being the rule rather than the exception.”

47. In the case of Kalma camp, in August, UNAMID had to repeatedly negotiate humanitarian access as conditions of life continued to deteriorate, with fuel reserves exhausted and motorized water pumps no longer operational, and the resources of the two medical clinics dwindling by the hour. The clinics had reported more than 60 cases of malnutrition, due to GoS obstruction. HAND (Human Rights and Advocacy Network for Democracy) also expressed concern about the outbreak of malaria and diarrhea among the displaced in Kalma and Biliel camps, with 15 children in Biliel dying in the first two weeks of August 2010 due to lack of healthcare or inadequate provision of health service aggravated by malnutrition.
48. While international assistance has kept humanitarian indicators relatively stable in 2010, dire poverty continues to be a key feature of displaced communities. In August 2010, 96 percent of Darfur’s displaced households surveyed had incomes below the poverty line, and 44 percent suffered from extreme poverty, with incomes of 50 percent or more below the poverty threshold. In resident communities, 82 percent of households lived in poverty, but only 6 percent suffered from extreme poverty.

#### *Attacks on local leaders and human rights defenders*

49. Attacks on targeted groups’ leaders are also monitored. According to an Amnesty International report, on 11 October 2010, police arrested Zahara Mohamed Alnaeam, a women’s rights activist and director of the Dar Al Salaam Organisation. Ms Alnaeam had just returned from a conference in South Africa. She was released later that day without being charged. Prior to the visit of the UNSC, the NISS arrested Awatif Ishag Ahmed, women’s rights advocate and editor of *Alrahil* Magazine. She was questioned extensively about her alleged relationship with the ICC and told to report to security offices.
50. During the October visit of the UN Security Council to Sudan, IDP leaders in Abu Shouk camp met with Council members. Displaced persons reported after the Council’s visit that security forces summoned leaders, threatened them, and demanded that they hand over the names and contact information of all those who spoke at the meeting with the Council. Security officers reportedly started searching for 16 people, who went into hiding; two of them were later arrested, one who had given a speech at a demonstration in El Fasher, calling for the Security Council to implement its outstanding resolutions, and one who had spoken with US Ambassador Susan Rice at Abashed camp. A number of leaders were arrested, with their detention extended from an initial few hours to three months.

#### *Forcible displacement*

51. 268,500 people are estimated to be newly displaced in 2010. It must be recalled in this regard that in their 12 July 2010 decision, the ICC Judges concluded that there were reasonable grounds to believe that acts of forcible displacement were committed against members of the targeted ethnic groups, constituting a material element of the crime of



genocide by causing serious bodily or mental harm, as provided for in article 6(b) of the Statute.

52. Forcible returns of IDPs are also of concern. Returns must be conducted according to international law principles: voluntariness, safety and dignity. For UNHCR, a voluntary return must be based on an IDP's fully informed decision to return because conditions that caused displacement no longer exist and security at the place of origin has improved. It cannot be based on intimidation, incentives or other undue pressure, such as cutting off aid. The returnee must have access to objective and up-to-date information in order to decide, and the return must be safe in both physical and legal terms. Authorities must provide assurance that the person returning does not face violence upon return; they must remove legal and administrative barriers and assist in the restoration of housing, land and property rights. A return finally requires a degree of material safety, *i.e.* availability of basic services, such as potable water, health and education.
53. In many instances, conditions for voluntary returns have been disregarded by the GoS. In the case of Kalma, unrest in August led to nearly half the population of the camp fleeing; IDPs who fled were reportedly refused return to Kalma or passage to Nyala, in line with the GoS determination to close Kalma permanently.
54. The GoS reportedly also denied access to UNAMID and relief agencies to Al Hamidiya camp in West Darfur after GoS attempts to close the camp resulted in death and injuries to the displaced. UNAMID was unable to identify those responsible, despite having a large military and policing force nearby. The Prosecution has received the names of those injured and killed.
55. It is also documented that when the displaced return to their land, they frequently either find it occupied by hostile tribes with whom they have to negotiate land access or, if they were able to plant earlier, they return to find their crops destroyed. Another emerging trend in many areas is that government-aligned militias are given free rein to collect "taxes" from civilian populations in exchange for the right of passage and "protection". Finally, the militia/*Janjaweed* now patrol and occupy large areas of Darfur and continue to commit atrocities such as rape, making returns impossible.
56. In August 2010, a UN Interagency Group briefing note made public described the conditions in Darfur as too dangerous to ensure civilians' safe return. Others have noted that the first step before returns are considered would be to halt Government attacks on civilians.

*Lack of access and information constituting part of the cover up of the genocide and other crimes*

57. In all above mentioned areas, a major trend has been the policy of the Government to deny access to the sites of violence and to prevent dissemination of information on crimes.
58. This seems underscored by the GoS "New Strategy for Darfur", which is based on the premise that the humanitarian crisis is over and that humanitarian capacity can be shifted to development. In terms of individual criminal responsibility, it is recalled that by

shifting attention away from protection activities for genocide victims, the authors contribute to concealing the crimes and promoting their continuation.

59. Discrepancies between Sudanese official statements and actual events were noted on 14 October 2010, in the UK Statement on behalf of the Security Council on its visit to Sudan: *“We then had a meeting with the Governor of Northern Darfur he argued that Darfur has seen significant improvements in the security, political and economic situation. He highlighted the commitment of the Government of Sudan to support development in Darfur and the voluntary return of refugees and IDPs, including through its new Darfur strategy. He called on the international community to put greater pressure on rebel groups to join the Darfur peace process and criticized the indictment by the International Criminal Court of President Bashir. In reply the Security Council mission expressed its deep concern about the upsurge in violence in Darfur; the number of civilian casualties and the continued restrictions on humanitarian access. We also reiterated the Security Council’s support for UNAMID and its personnel and underlined the Security Council’s call on the Government of the Sudan and all relevant parties to co-operate fully with UNAMID. We expressed the Security Council’s support for the AU-UN led peace process and the work of the Joint Chief Mediator, Mr Bassole and urged all rebel groups to join the Doha peace process without preconditions or further delay. Members of the Security Council mission also underlined the need for action on impunity.”*
60. Since the March 2009 NGO expulsions, ministries have reportedly been given veto power over promulgation of data and reports. In the words of a UN official speaking confidentially about the Darfuris, their plight is *“[n]ot seen, not heard, not helped, therefore not recorded.”* Observers have noted a gradual absence of data, reports and news dispatches which has been described as an *“information vacuum.”* The last UN Darfur Humanitarian Profile appeared in January 2009. Among the documents that have stopped appearing are malnutrition studies. Reporting on protection issues such as rape has significantly diminished. A report on land occupation in West Darfur has never been made public.
61. Efforts to document violations are hampered by expulsions; since the beginning of 2009, there have been 47 incidents of NGO expulsions (both group and individual), and revocation of NGO licenses to operate in the Sudan, not taking into account those that were negotiated bilaterally, and were not reported On 30 October 2010, Nafie Ali Nafie, Assistant to the President, accused NGOs of being tools of domination of the third world and that they should no longer be working in the Sudan.
62. International staff undertaking protection work, including reporting on violations, have been expelled from Darfur and sent elsewhere in the Sudan, when it has been made clear that it would not be safe for them to return to Darfur. International workers in Darfur are thus discouraged by such examples from engaging in protection activities.
63. In the face of such a situation, the 18 October 2010 UN Secretary-General’s report notes that *“a joint mechanism has been agreed whereby any case of international humanitarian workers being given notice to leave Darfur will be submitted for consultation to the Ministry of Foreign Affairs, Ministry of Humanitarian Affairs and the United Nations Humanitarian Coordinator, together with clear reasons and evidence.”*

64. UNICEF has expressed concern that the GoS “*very often*” bars the release of data on child malnutrition in Darfur. Nils Kastberg, UNICEF Representative in Sudan, stated: “*Part of the problem has been when we conduct surveys to help us address issues, in collaboration with the ministry of health, very often other parts of the government such as the humanitarian affairs commission interferes and delays in the release of reports, making it difficult for us to respond timely.*” The UNICEF country chief said “*we are raising these issues with the government at the moment that the humanitarian affairs commission should not interfere with the release of these reports.*” Kastberg also pointed out that certain government agencies hinder the entry of UNICEF staff into the camps. “*Sometimes it is security services that hinder access or delay access, sometimes it is the humanitarian affairs office that delays the release of nutritional surveys. Sometimes it is delays in granting permissions and visas.*”
65. UNAMID for its part counts the violent deaths it encounters during limited travels; but mortality from malnutrition and disease that result from earlier violence, as well as violent mortality beyond UNAMID’s reach are not documented. Some observers are trying to update these numbers, based on studies such as Darfurian Voices, by 24 Hours for Darfur, which attempts to assess mortality based on the experience of Chadian refugees.
66. Finally, Radio Dabanga is one of the last of the media communicating from the ground without having to go through the official vetting of the authorities – a problem which has been affecting reporting by UN and other agencies. The shut down of Radio Dabanga on 2 November in Khartoum and the arrest of 13 employees is therefore another worrying step in covering up the ongoing commission crimes.

#### *Child soldiers*

67. The Prosecution has taken note of an agreement reported on 21 July 2010 to allow UN access to JEM bases to check that children are not being recruited. UNICEF hailed the agreement as a very valuable precedent which it hoped other rebels would follow. The Prosecution has also noted the October report of the UN Secretary-General, in which SLA Abu Gasim provided UNAMID with a second action plan committing itself to ending recruitment and use of child soldiers. SLA-Free Will provided its first progress report to UNAMID, confirming dissemination of a command order prohibiting its elements in Northern Darfur from recruiting or using child soldiers. The Prosecution will continue to monitor this situation.

#### **National and other efforts to promote accountability**

##### *Admissibility of the cases*

68. Since March 2005, the Office pursued its assessment as to whether the Sudan investigated or prosecuted, or is investigating or prosecuting genuinely those most responsible for the most serious crimes in Darfur. All Sudanese accountability initiatives are followed. To this day however, the crimes committed by Ahmad Harun, Ali Kushayb, President Al Bashir and the Haskanita perpetrators are not the subject of domestic proceedings in the Sudan.

69. The Pre-Trial Chamber found in its 27 April 2007 decision on Harun and Kushayb that the case presented by the Prosecution appears to be admissible. In its 9 March 2009 and 12 July 2010 decisions on President Al Bashir and in its 7 May 2009 and 27 August 2009 decisions on Haskanita, the Pre-Trial Chamber found “*no ostensible cause of self-evident factor impels the Chamber to exercise its discretion to determine the admissibility of the case...at this stage.*”

#### *Obstacles to domestic proceedings*

70. To this date, 5 years after their creation in June 2005, the special courts and all the other national mechanism created have not done any case addressing the systematic pattern of crimes committed in Darfur. All cases tried were chosen from the files of the ordinary courts and related to ordinary crimes.

71. Obstacles to national proceedings are widely documented and include threats and torture against witnesses and other interference from the security services, as well as immunities of officials, as described by the African Union High-Level Panel on Darfur, chaired by former South African President Thabo Mbeki. The report calls for “*introduction of legislation to remove all immunities of State actors suspected of committing crimes in Darfur.*” The report notes as well that “*It is critically important for the whole criminal justice system to win the confidence of affected communities and in particular the victims themselves. Credible assurances of protection and respect for their dignity are essential if victims are to cooperate with criminal investigations.*”

72. On 17 September 2010, in the UN Human Rights Council debate, Justice Mohammed Chande Othman also stressed that there is still a culture of impunity in Darfur.

73. The justice system in the Sudan is dominated by the NISS, which maintains extensive powers of arrest and detention without judicial review, and whose members benefit from immunity (immunities can only be waived by the NISS Director where it appears that the relevant actions were not connected to NISS work). Article 52(1) of the National Security Act states that any act committed by the NISS while pursuing their duties and with “good intentions” should not be considered a crime. There is no instance where these immunities were lifted and an NISS member investigated and prosecuted for human rights violations.

74. On 27 September 2010, Special Prosecutor for Darfur Nimr Mohamed visited North Darfur and announced his intention to begin investigations into the 2 September attack on Tabra, which resulted in a reported 37 or more people killed and 50 or more people injured (see above paragraph 37).

75. His announcement was followed by a high-level 28 September meeting in Khartoum, involving Jalal al Din Mohammed Othman, Head of the judiciary; Ghazi Salah al Din Atabani, Presidential Advisor responsible for the Darfur portfolio; Mohammed Bishara Dossa, Minister of Justice; Abdul Rahim Mohamed Hussein, Minister of National Defence; Ibrahim Mahmoud Hamed, Minister of Interior; and Mohammad Atta al Moula NISS Director General.

76. Two weeks later, in mid-October, Prosecutor Nimr was released from his position and replaced by Abdel Daim Zamrawi, Under-Secretary of the Ministry of Justice.

### *Complementary accountability efforts*

77. The Prosecution has also followed upon 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.*”
78. In October 2009, the African Union High-Level Implementation Panel, chaired by former South African President Thabo Mbeki, and established to address “*the inter-linked issues of combating impunity and promoting peace, reconciliation,*” issued its report.
79. Among the “*current major obstacles to justice and reconciliation in Darfur*”, the Panel lists “*absence of political will; denial of what happened and is happening in Darfur, as well as obscuring of the truth; war, fear and insecurity; poor policing and enforcement of law and order; impunity for the crimes committed in Darfur; unwillingness to use the law to attend to violations of human rights; failure to reform the judiciary; and the lack of a sufficient number of qualified personnel in the judiciary.*” Listed “*factors [that] would facilitate justice and reconciliation*” include: “*respect for the rule of law; judicial reforms that will lead to an autonomous and impartial judiciary; investigations of human rights abuses; presenting an accurate picture of the situation in Darfur; lack of sympathy for the perpetrators of crimes..., and prosecution of individuals suspected of crimes in Darfur by competent and independent courts which would accord them fair trials.*” The report was adopted unanimously on 29 October 2009 at a High-Level meeting of the AU Peace and Security Council in Abuja.
80. The Prosecution has remained in contact with President Mbeki. There is no information that the report’s recommendations have been implemented. The Prosecution understands that the current focus is inclusion of some or all of the report’s recommendations into the draft Darfur peace agreement.
81. President Mbeki and the Panel have a crucial role to play, as do the AU and the League of Arab States, the UN and other international actors.

### **Cooperation including for the enforcement of arrest warrants**

82. 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.
83. 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.
84. The whereabouts of the three individuals concerned are known. In particular Ahmad Harun can be found in his Governor’s residence in Southern Kordofan.
85. In the absence of any measure taken by the Sudanese authorities to abide with UNSC Resolution 1593 (2005), many States and organizations continue to take steps to isolate and ultimately facilitate the surrender of the individuals sought by the Court.

86. The Judges of the ICC have recalled the obligations of States in this regard. Following President Al Bashir visits to Chad and Kenya, on 27 August 2010, the Chamber issued its Decision informing the Security Council and the Assembly of States Parties about Omar Al Bashir's presence in Kenya, as well as its Decision informing the Council and the Assembly about his visit to Chad. The EU issued a statement on 27 August 2010, calling on Kenya to arrest President Al Bashir.
87. Since then, the warrant against President Al Bashir prompted the postponement and change of location of the Intergovernmental Authority on Development (IGAD) Summit, originally scheduled on 30 October 2010 in Nairobi. On 16 October, the Kenya chapter of the International Commission of Jurists indicated it intended to go to Kenyan courts to seek an order for the Government to enforce the ICC warrant should President Al Bashir come to Kenya again. On 25 October, 23 civil society groups from Kenya and other African countries sent a letter to President Kibaki stating that Kenya's Constitution and the International Crimes Act oblige the Kenyan government to arrest President Al Bashir.
88. On 27 October, Kenyan Assistant Minister for Foreign Affairs, Richard Onyonka stated that the meeting has been delayed, and that Kenya would honour "*whatever the ICC requires.*"

## Conclusion

89. On 25 May 2010, in relation to the Harun and Kushayb case, 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 decision, the Pre-Trial Chamber considers that the Court has taken "*all possible measures to ensure the cooperation of the Republic of the Sudan.*"
90. The decision stresses "*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...*" 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.*"
91. Under Security Council Resolution 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.*"
92. In Presidential Statement 21 of 16 June 2008, "*The Security Council 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, the Council 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.*"

93. The Government of the Sudan, as the sovereign territorial State, has the primary responsibility and is fully able to implement the warrants issued by the Court. It has not done so. The matter is in the hands of the UN Security Council.