

TWENTY-FOURTH REPORT OF THE PROSECUTOR OF THE INTERNATIONAL CRIMINAL COURT TO THE UNITED NATIONS SECURITY COUNCIL PURSUANT TO UNSCR 1593 (2005)

1. INTRODUCTION

1. On 31 March 2005, the United Nations Security Council (the “Council”) adopted Resolution 1593 (“UNSCR 1593”), referring the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court (“ICC” or the “Court”).
2. This is the twenty-fourth report submitted to the Council by the Prosecutor of the ICC (the “Prosecutor”) pursuant to paragraph 8 of UNSCR 1593. This report provides an update on the judicial activities since the Office of the Prosecutor’s (the “Office”) last report to the Council on 9 June 2016. In particular, this report addresses recent judicial activities, the status of the Office’s on-going investigations and its inquiries into allegations of recent and current crimes. In addition, the report provides updates on the failure of the Government of the Republic of Sudan (“GoS”), as well as of some ICC States Parties (“States Parties”), to cooperate with the Court, thereby violating the Rome Statute (“Statute”) and undermining UNSCR 1593.
3. As the Office has reported to the Council on numerous occasions, four suspects who are members of the GoS or GoS-aligned militias remain at large in Sudan, many years after arrest warrants were issued against them. These suspects are Messrs Omar Hassan Ahmad Al Bashir (“Al Bashir”), Ahmad Muhammad Harun (“Harun”), Ali Muhammad Ali Abd-Al-Rahman (“Ali Kushayb”), and Abdel Raheem Muhammad Hussein (“Hussein”). Mr Ali Kushayb continues to be active in GoS-aligned militias operating in Darfur, while the other three suspects continue to occupy high-ranking positions within the GoS. In addition, Mr Abdallah Banda Abakaer Nourain, against whom an arrest warrant was issued on 11 September 2014, also remains at large in Sudan.
4. The Office reiterates that the GoS is under an obligation to immediately arrest and surrender all of these wanted individuals to the Court. This Council has an equal

responsibility to ensure that the GoS complies with this obligation without further delay.

5. The Rome Statute system has two essential pillars: a judicial pillar provided by the ICC, as an independent and permanent judicial body; and an execution and enforcement pillar provided by States Parties, and in relation to UNSCR 1593, this Council. The Office's progress on its investigations and prosecutions arising out of UNSCR 1593 depends significantly upon this Council and States Parties taking the enforcement steps necessary to ensure the arrest and surrender of the suspects. In this context, the Office's reports are not merely intended to update the Council on developments, but also to seek its assistance in the enforcement of the mandate entrusted to the Court pursuant to Chapter VII of the Charter of the United Nations ("UN").

2. RECENT JUDICIAL ACTIVITIES

Litigation in South Africa

6. Domestic litigation has concluded in respect of the Republic of South Africa ("South Africa") and its failure to arrest Mr Al Bashir during his attendance at the African Union ("AU") summit in June 2015. The Council will recall that the South African government appealed the 15 March 2016 Supreme Court of Appeal decision finding that the government's failure to arrest Mr Al Bashir was unlawful. On 22 November 2016, the South African Constitutional Court was due to hear this appeal. On 18 November 2016, the Constitutional Court issued a direction noting South Africa's withdrawal of its appeal. The Supreme Court of Appeal's decision is thus final.
7. Pre-Trial Chamber II of the ICC has yet to make a determination on whether South Africa is in non-compliance pursuant to article 87(7) of the Statute. Pursuant to the Pre-Trial Chamber II decision of 15 October 2015, South Africa was granted an extension of the time-limit to submit its views on the events surrounding Mr Al Bashir's attendance at the June 2015 AU summit, until such time as the relevant judicial proceedings before the courts of South Africa are finalised. Given that at this juncture these domestic proceedings are finalised, it is expected that South Africa will submit these views in the near future.
8. On 19 October 2016, South Africa deposited its notice of withdrawal from the ICC with the UN Secretary-General. Therefore, under article 127 of the Statute, absent revocation of this notice, the withdrawal shall take effect on 19 October 2017. It

should be noted that pursuant to article 127(2) of the Statute, South Africa is not discharged, by reason of a withdrawal from the Statute, from the obligations arising from the Statute whilst it was a State Party. A withdrawal does not prejudice in any way the continued consideration of any matter which was already under consideration by the Court prior to the date on which the withdrawal became effective.

Judicial decisions and requests related to failures to arrest ICC suspects

9. Since the Office's last report on 9 June 2016, a number of States have failed to arrest the persons sought by the Court. During the reporting period, Mr Al Bashir has travelled across international borders multiple times with impunity, including on one occasion with suspect Mr Hussein.
10. The vast majority of States Parties do not host Mr Al Bashir and other suspects on their territory. Nonetheless, the Office stresses again that this Council's continued failure to take appropriate action in relation to those States Parties that do host Mr Al Bashir, but fail to arrest him, only emboldens him to continue to travel with impunity.
11. During the reporting period, Mr Al Bashir has travelled unhindered to a number of States Parties, which are obligated to immediately arrest and surrender him to the Court. Mr Al Bashir visited the Republic of Chad ("Chad") on 8 August 2016. This was the sixth time Mr Al Bashir has visited Chad since the Court issued the first arrest warrant against him. The Registry informed the Chamber of this visit on 13 September 2016. It should be recalled that on 27 August 2010, the Chamber informed the Council of Mr Al Bashir's 21 July 2010 visit to Chad. Subsequently, on 13 December 2011 and 27 March 2013, respectively, the Chamber found Chad in non-compliance with its obligations under the Statute to arrest and surrender Mr Al Bashir during his visits to Chad. Chad has once again defied the Court's decisions, and undermined UNSCR 1593 by failing to arrest and surrender Mr Al Bashir during his visit on 8 August 2016.
12. As the Council will recall from the Office's 9 June 2016 report, Mr Al Bashir travelled to the Republic of Djibouti ("Djibouti") on 8 May 2016 and, three days later, to the Republic of Uganda ("Uganda") on 11 May 2016. As reported to the Council in June 2016, due to the failure of Djibouti and Uganda to arrest and surrender Mr Al Bashir, on 17 May 2016, the Chamber issued two separate decisions, *proprio motu*, commencing the article 87(7) non-compliance process against Djibouti and Uganda.

The Chamber requested both Djibouti and Uganda to explain why they had failed to arrest and surrender Mr Al Bashir, during his visits to these countries, on 8 May 2016 and 11 May 2016 respectively.

13. On 11 July 2016, the Chamber rendered two separate decisions of non-compliance against Uganda and Djibouti. In these decisions, the Chamber found that there had been no justifiable basis for their failure to arrest Mr Al Bashir whilst on their respective territories, and referred the matter to this Council and the Assembly of States Parties (“ASP”).
14. In these non-compliance decisions, the Chamber emphasised the critical enforcement role to be played by the Council:

[U]nlike domestic courts, the Court has no direct enforcement mechanism and must rely on cooperation by the States in order to fulfil its mandate. It is therefore of particular importance that the Security Council, after referring a situation to the Prosecutor of the Court as constituting a threat to international peace and security, responds with any appropriate measure to the failure on the part of States Parties to the Statute to cooperate with the Court in order for it to fulfil the mandate with which it has been entrusted. In the absence of follow-up actions on the part of the Security Council any referral to the Court under Chapter VII of the Charter of the United Nations would become futile and incapable of achieving its ultimate goal of putting an end to impunity.

15. To date, the Council has not fulfilled this important role. Since the referral of the Darfur situation, the Chamber has issued 13 judicial decisions finding non-compliance and/or requesting that appropriate action be taken against States Parties and the Sudan for failing to arrest Mr Al Bashir and other fugitives wanted by the Court. Of these decisions, nine are findings of non-compliance pursuant to article 87(7) of the Statute that have been subsequently referred to this Council and the ASP. The remaining decisions include three informing this Council and the ASP of Mr Al Bashir’s travel to the relevant State Party, and one informing this Council and the ASP of the failure of Sudan to arrest and surrender Messrs Harun and Ali Kushayb, so that the Council and the ASP can take appropriate action.

16. The Council has yet to act to give effect to these decisions. This is an untenable situation. These decisions plainly demonstrate that the Court's work is being undermined by those States Parties that fail to adhere to their treaty obligations under the Statute and disregard the Court's warrants.
17. To ensure the referral under UNSCR 1593 does not become futile and incapable of achieving its stated goals, this Council must take action against this obstruction of not only the Court but also this Council. This obstruction undermines the credibility of the Council. In this regard, it is instructive that the Council's Resolution 2296 (2016) of 29 June 2016 ("UNSCR 2296") began by "[r]eaffirming all its previous resolutions and presidential statements concerning the situation in Sudan and underlining the importance of full compliance with these."
18. The Office again urges this Council to take robust and concrete measures to ensure compliance with the Court's arrest warrants when suspects travel to the territories of States Parties. Decisive action from this Council will enhance the prospects of arrest of all the ICC fugitives from the situation in Darfur, Sudan. Thousands of victims from Darfur who have been patiently waiting for justice deserve no less from this Council.
19. At a minimum, proposals made before this Council by New Zealand in December 2015 and again in June 2016 ought to be given consideration and implemented. Specifically, the Office recalls that New Zealand suggested that the findings of non-compliance issued by the Court and referred to the Council could be discussed either in a draft resolution or statement, letter and/or in a meeting with the country concerned. In addition, New Zealand called for more serious consideration on how this Council and the UN might achieve a productive relationship with the GoS.

Travel to non-States Parties

20. Mr Al Bashir has also continued to travel to various non-States Parties during the reporting period, including on one occasion together with the suspect, Mr Hussein.
21. Although non-States Parties are not obligated to comply with the Court's arrest warrants, the Office underscores that UNSCR 1593 "urges all States [...] to cooperate fully" with the Court. Failure to execute warrants of arrest issued by the Court undermines the interests of justice and the global movement towards greater accountability for the world's gravest crimes as listed in the Statute. The Office, yet again, urges the Council to use its powers under the UN Charter to ensure

compliance with the pending arrest warrants for all Darfur situation suspects, should they travel across international borders.

22. The Office benefits from this report to also call on all States to fully cooperate with the Court in the arrest and surrender of suspects against whom ICC arrest warrants have been issued. Allowing suspects to travel across international borders with impunity equally erodes public confidence in our common responsibility to end impunity for the world's most serious and destabilising crimes as well as our ability to ensure victims attain the justice they so rightly deserve.

3. ONGOING INVESTIGATIONS

Current investigations

23. As highlighted in the 9 June 2016 report to the Council, the Office continues with its investigations with the goal of bringing justice to the victims of Rome Statute crimes committed in Darfur. As indicated in previous reports, given the Office's severe resource constraints, investigations are not proceeding as quickly as the Office would have wished, despite the many investigative leads that are being pursued. Given the decisions taken last month at the Fifteenth session of the ASP with respect to the 2017 budget, and in light of the Office's existing situations and cases, some of which are in or nearing commencement of trial, it will be increasingly difficult for the Office to allocate adequate resources to the Darfur investigation in the coming year as it had otherwise intended to do. This unfortunate situation will inevitably restrict investigative steps that could otherwise be taken if additional resources were available. The Office therefore reiterates its appeal to the Council to support and facilitate financial assistance by the UN for the Darfur investigations, to ease the heavy financial burden placed on States Parties by the Council's referral, and the resulting impact on the Office's resources.
24. Despite these significant difficulties, the Office continues to do the best it can to advance its investigations and bring justice to victims in Darfur. Additional investigators have recently been assigned to the team working on the Darfur cases. During the reporting period, the Office has undertaken further investigative steps in the cases against the Darfur suspects pursuant to the Office's investigative mandate under article 54(1) of the Statute. More witnesses have been interviewed and additional evidence has been obtained. Further efforts are being made to identify additional potential witnesses. These efforts are proving productive. Other investigative leads have been developed and refined. In sum, within the limited

resources available, the team has managed to make real progress and has obtained significant additional evidence. The Office will continue to do its part in collecting evidence and strengthening its cases against all suspects. These efforts can only bear fruit for Darfur victims if all suspects are apprehended and transferred into the custody of the Court.

Inquiry into allegations of current crimes

25. The Office continues to monitor and inquire into current crimes allegedly being committed in Darfur. The Office notes reports that the level of violence against civilians appears to have decreased - reportedly between 287 and 329 civilians were allegedly killed during this reporting period, compared to between 626 and 742 during the previous reporting period. Nevertheless, reports of violence and allegations of crimes within the Court's jurisdiction persist.
26. Attacks on civilians, including sexual and gender-based crimes, continue to be alleged in Darfur on an alarming scale. Over recent reporting periods, the Office has informed the Council of the continuing alleged attacks by the GoS on civilians and the commission of offences involving sexual violence. In this regard, the Office notes several relevant reports made to this Council. For instance, a 1 July 2016 report to the Council by the Secretary-General on the African Union-United Nations Hybrid Operation in Darfur stated that "[t]he human rights situation remained volatile and unpredictable, with continued clashes in the Jebel Marra [...]. Attacks against civilians worsened on account of the alleged complicity of the Sudanese security forces [...]. Women and girls continued to be exposed to sexual and gender-based violence, including conflict-related sexual violence." A 22 June 2016 report to the Council by the Secretary-General on conflict-related sexual violence also stated that "[c]onflict-related sexual violence remains of grave concern in Darfur, where patterns of ethnically motivated sexual violence as a means of punishment, persecution and forced displacement have been noted for 12 years."
27. Further, during this reporting period, as the Council is no doubt aware, on 29 September 2016, Amnesty International ("AI") published a report alleging that Sudanese Armed Forces/GoS had used chemical weapons against civilians during attacks on Jebel Marra in Darfur throughout the course of 2016. In particular, AI reported that there was credible evidence to strongly suggest that chemical weapons such as vesicants or blister agents, and/or biological toxins, were used against civilians. According to AI, the GoS is suspected to have used chemical weapons in

32 attacks. AI alleged that between 200 and 250 people, including many children, may have died from exposure to chemical weapons agents. The basis of these allegations included the symptoms described by victims and rebels, pictures and videos and analysis by two chemical weapons experts instructed by AI.

28. The Office notes that the GoS responded to AI on 27 September 2016 with a letter that disputed the allegations in AI's report. The Office further notes that in a briefing to the Council on 4 October 2016, Mr Hervé Ladsous, the UN Under-Secretary-General for Peacekeeping Operations ("UNSG") stated "[w]e have not come across any evidence regarding the use of chemical weapons in the Jebel Marra". In this context, however, UNSG Ladsous also pointed out that the GoS has consistently denied any access by the African Union-United Nations Hybrid Operation in Darfur ("UNAMID") to the conflict areas in Jebel Marra and that this has prevented UNAMID from being able to monitor effectively and to report on the impact of the fighting. Lastly, the Office notes that the Organisation for the Prohibition of Chemical Weapons ("OPCW") had stated, in an initial assessment, that without further information being made available, it is not possible, at this stage, to draw any conclusions based on the content of the AI report.
29. The allegations of chemical weapons use by the GoS, if true, would represent an atrocious new crime against civilians in Darfur, including women and children. Despite limited resources and an inability to conduct *in situ* investigations in Sudan, the Office is nevertheless pursuing inquiries and investigative steps in order to determine the veracity of such serious claims. The Office calls on the Council to compel the GoS to allow unfettered access to Jebel Marra by UNAMID, OPCW, and the Office, to fully investigate the allegations of attacks against civilians in the area, including the use of chemical weapons.
30. The Office also notes, as has this Council, that various sources, including the UN, suggest that the GoS continues to restrict access to the Jebel Marra area of Darfur, where combat between the Sudan Liberation Movement-Abdul Wahid and the GoS continues to impact heavily on civilians. For instance, in its press release on 10 October 2016, UNAMID's Joint Special Representative expressly "call[ed] on the International Community as well as all Special Envoys of countries concerned to exercise influence and ensure UNAMID has unrestricted access all over Jebel Marra."

31. In the same vein, on 11 July 2016, Switzerland, as a member of the Working Group on the Universal Periodic Review, called on the GoS to “[f]acilitate the access of United Nations agencies and other humanitarian actors to conflict zones”. On 28 July 2016, the Independent Expert on the Situation of Human Rights in the Sudan reiterated the same call and expressed concern about “the detrimental effects of the conflict on civilians in the light of allegations of human rights violations and serious violations of international humanitarian law, including indiscriminate killings, destruction and burning of villages, abduction of and sexual violence against women, as well as large-scale displacement of civilians.”
32. The Council should act decisively to ensure that warring factions, including the GoS, allow humanitarian actors unhindered access to the Jebel Marra area of Darfur as soon as possible, in order to alleviate the suffering of countless Darfuri victims.

4. LACK OF COOPERATION BY THE GOS AND OTHER PARTIES

33. UNSCR 1593 stated that the “Government of Sudan and all other parties to the conflict in Darfur, shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution.” This requirement of cooperation by the GoS could not be clearer. However, since the arrest warrants have been issued, there has been no acknowledgement of the Court’s jurisdiction by the GoS, let alone assistance. Indeed, the numerous *notes verbales* sent to the GoS by the Registry of the Court have been returned unopened.
34. The GoS has the responsibility to implement the warrants of arrest issued by the Court. It has consistently and expressly refused to do so. Immediate execution of the warrants will not only enable the Court to carry out its core function but may also greatly assist in the prevention of further crimes. Indeed, as UNSCR 2296 emphasised, “the Government of Sudan bears the primary responsibility to protect civilians within its territory and subject to its jurisdiction, including protection from crimes against humanity and war crimes.”

5. CONCLUSION

35. Despite the severe limitations on its resources, and cooperation challenges, the Office will continue to do everything it can to deliver justice to the countless victims of Rome Statute crimes in Darfur.

36. In UNSCR 2296, this Council reiterated its determination that “the situation in Sudan constitutes a threat to international peace and security.” It further emphasised that “those responsible for violations of international humanitarian law and violations and abuses of human rights must be held accountable.” Notwithstanding these declarations, the Council, as an important pillar of enforcement, has not taken the follow-up steps necessary to ensure that accountability is realised in practice. Through concrete action to promote State compliance, the Council can not only contribute to effecting the arrest and surrender of the suspects against whom ICC warrants of arrest have been issued in the Darfur situation, but also may prevent the commission of further grave crimes in Darfur.
37. It is only with the support of this Council and the international community at large that together we can achieve accountability in the Darfur situation, and by so doing, hope to contribute to sustainable peace and stability in Sudan. | o r r