



**TWENTY-SEVENTH 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 (“UNSC” or “Council”) adopted Resolution 1593 (“UNSCR 1593”), referring the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court (“ICC” or “Court”). The Council invited the Prosecutor to address it every six months on actions taken pursuant to this resolution.
2. This is the twenty-seventh report and update on the activities of the Office of the Prosecutor (“OTP” or “Office”) in the situation in Darfur since the last report dated 12 December 2017. In particular, this report gives an update on recent judicial activities, the Office’s ongoing investigations and cooperation efforts.

**2. THE CASES AGAINST MESSRS AL BASHIR, HARUN, HUSSEIN, KUSHAYB AND BANDA**

3. Regrettably all the suspects in the Darfur situation remain at large. Messrs Omar Hassan Ahmad Al Bashir (“Mr Al Bashir”), Ahmad Muhammad Harun, and Abdel Raheem Muhammad Hussein maintain their senior positions in the Government of the Republic of the Sudan (“GoS”). Messrs Ali Muhammad Ali Abd-Al-Rahman (also known as Ali Kushayb) and Abdallah Banda Abakaer Nourain are also yet to be arrested and surrendered to the Court.
4. Regardless, the Office will continue its investigations in the Darfur situation. These efforts must be supported by the Council. If there is to be justice for the victims in Darfur, the Council must accept its responsibility to ensure that States Parties to the Rome Statute cooperate with the Office to secure the arrest and surrender of the Darfur suspects. In particular, the Council must find a way to give substantive effect to the referrals of the Court’s decisions that have found States Parties and Sudan in non-compliance with their obligations under the Rome Statute to arrest and surrender the suspects in the Darfur situation.

### 3. RECENT JUDICIAL ACTIVITIES

*Litigation related to the Hashemite Kingdom of Jordan ("Jordan")*

5. On 11 December 2017, Pre-Trial Chamber II ("PTC II") rendered a decision on Jordan's failure to arrest and surrender Mr Al Bashir to the Court during his attendance at the 28<sup>th</sup> Arab League Summit in Amman on 29 March 2017. PTC II found, pursuant to article 87(7) of the Rome Statute, that Jordan failed to comply with its obligations under the Statute by not executing the Court's request for the arrest and surrender of Mr Al Bashir while he was on Jordanian territory on 29 March 2017. PTC II also referred the matter to the Assembly of States Parties ("ASP") and the Council.
6. On 18 December 2017, Jordan sought leave to appeal this decision with respect to four issues. In its response on 21 December 2017, the Prosecution requested that the Chamber grant Jordan's application with respect to the second and third of these issues only, which it proposed to re-frame. On 21 February 2018, PTC II, by majority, granted Jordan leave to appeal with respect to the second, third and fourth issues included in Jordan's notice of appeal, as follows:

[...]

  - ii) The Chamber erred with respect to matters of law in its conclusions regarding the effects of the Rome Statute upon the immunity of President Al-Bashir [...];
  - iii) The Chamber erred with respect to matters of law in concluding that U.N. Security council resolution 1593 (2005) affected Jordan's obligations under customary and conventional international law to accord immunity to President Omar Hassan Ahmad Al-Bashir; and
  - iv) Even if the Chamber's Decision with respect to non-compliance was correct [...], the Chamber abused its discretion in deciding to refer such non-compliance to the Assembly of States Parties and the U.N. Security Council.
7. On 12 March 2018, Jordan filed its appeal against PTC II's finding of non-compliance and the subsequent referral to the ASP and the UNSC. In its response to Jordan's appeal, the Prosecution argued that it should be dismissed for a number of reasons

and Jordan should be referred to the ASP and the Council. Jordan's submission also included a request that PTC II's decision on referral to the ASP and the UNSC be suspended until resolution of the appeal. The Prosecution agreed in principle that granting suspensive effect was appropriate but deferred to the Appeals Chamber's discretion to do so. On 6 April 2018, the Appeals Chamber granted Jordan's request for suspensive effect.

8. On 29 March 2018, the Appeals Chamber issued an order inviting the United Nations ("UN"), the African Union, the European Union, the League of Arab States and the Organization of American States, to submit, by 16 July 2018, observations on the merits of the legal questions presented in Jordan's appeal.
9. In the same order, the Appeals Chamber also invited expressions of interest for observations from States Parties and professors of international law, because Jordan's appeal "raises legal issues that may have implications beyond the present case". In these circumstances, the Appeals Chamber considered it "desirable to invite observations from international organisations, States Parties and Professors of International Law on these issues to assist the Appeals Chamber in its determination." Given the significance of this issue in the Darfur situation and more generally, it is encouraging that, in response to the Appeals Chamber's invitation, a number of professors of international law, as well as an ICC State Party, the United Mexican States ("Mexico"), requested leave to submit observations.
10. On 21 May 2018, the Appeals Chamber granted leave to Mexico and 16 professors of international law to submit, by 18 June 2018, observations on the merits of the legal questions presented in the appeal. In this same decision, the Appeals Chamber stated that Jordan and the Prosecution may submit consolidated responses to these observations, by 16 July 2018.
11. The Appeals Chamber also convened a hearing for the appeal on 10, 11 and 12 September 2018 and granted Jordan's request for leave to reply to the Prosecution's response to its appeal and ordered this reply to be conveyed orally during the scheduled hearing.
12. On 25 May 2018, the Appeals Chamber issued an order that as "a State and a person concerned in the legal questions presented in the appeal of the Hashemite Kingdom of Jordan, the competent authorities of the Republic of Sudan and Mr Omar Hassan Ahmad Al-Bashir may each file submissions [...] on the merits of these questions [...] by 16 July 2018."

13. On 30 May 2018, the African Union (“AU”) filed a notification of its acceptance of the Appeals Chamber’s invitation to submit observations in the appeal. In particular, the AU stated that it “welcomes the opportunity to engage in a form of legal dialogue with the ICC on the important institution and role of immunity under general international law.”
14. The Office welcomes the Appeals Chamber’s invitation to the different stakeholders to file submissions and contribute legal arguments for consideration in its final determination of this important issue.

*Travel to States Parties*

15. As the Council will recall, on 14 November 2017, Mr Al Bashir reportedly entered the territory of the Republic of Uganda (“Uganda”) on an official visit. Despite an advance reminder to Uganda from the Registry of the ICC of its obligation to arrest and surrender Mr Al Bashir to the ICC while present on its territory, Uganda failed to do so. As a consequence, on 13 December 2017, PTC II invited Uganda to provide submissions concerning this failure to arrest and surrender Mr Al Bashir by 22 January 2018, a time limit that was subsequently extended to 16 February 2018. On 22 February 2018, the Registry received a *note verbale* from Uganda, currently classified as confidential.
16. Likewise, during his latest two-day visit to the Republic of Chad (“Chad”) on 1-2 December 2017, Mr Al Bashir’s access to, and departure from the territory of this State Party was unhindered by the Chadian authorities. On 13 December 2017, PTC II invited Chad to provide, by 22 January 2018, submissions concerning its failure to arrest Mr Al Bashir and surrender him to the Court. On 16 May 2018, the Registry received a confidential *note verbale* from Chad in response to PTC II’s 13 December 2017 invitation. The Registry has indicated that it has contacted Chad to enquire whether there would be any additional information explaining the delay in providing submissions. The Registry has not yet received any reply from the authorities of Chad.
17. In recent years, both Uganda and Chad have been referred to the Council by Pre-Trial Chambers of the ICC after each of these States Parties failed to arrest and surrender Mr Al Bashir to the Court while on their territory: Uganda in 2016 and Chad in 2011 and 2013. In each case, the Council has failed to take any steps whatsoever in relation to these referrals, and therefore, predictably, these States Parties continue to host Mr

Al Bashir. The Office will keep the Council updated on the ongoing litigation in relation to Uganda and Chad.

18. It is unfortunate that no adequate steps are being taken to address Mr Al Bashir's unhindered travels to certain States Parties. Given these circumstances, the Office expects to continue to report to the Council on failures by States Parties to arrest and surrender Mr Al Bashir during official visits.
19. The Office notes with encouragement that despite a lack of collective action, some members of the Council have repeatedly expressed their support for initiatives on this issue, such as New Zealand's December 2016 proposals to address States' failures to implement the Council's own resolutions. In a recent example of support, in response to the Prosecutor's twenty-sixth report in December 2017, France suggested "that States deemed by the Court to have breached their obligation to cooperate be invited to address the Council and that, on the basis of such an exchange, the Council then determine the next steps to be taken." On the same occasion, other members of the Council, including Uruguay, Sweden and Senegal, also took the opportunity to continue to encourage the Council to adopt effective measures when seized due to States' non-cooperation with the Court. It bears recalling article 87 of the Rome Statute in this context, which specifically stipulates a role for the Council, as enshrined in the Court's founding treaty, in relation to cases of non-compliance referred to it by the Court's judges.
20. The Council continues to be presented with a range of options to respond to States Parties that invite and host the Darfur suspects on their territory, but has not yet selected any of these options. The Office again urges the Council to consider these options. The Office also again requests the Council to remind Sudan that it is under a legal obligation to immediately arrest and surrender the suspects in the Darfur situation to the Court.

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

21. Since the Office's last report to the Council, Mr Al Bashir has continued to travel to States not party to the Rome Statute, including: Ethiopia on 8 December 2017, from 28 to 30 January 2018 and again, from 20 to 22 April 2018; Turkey on 13 December 2017 and 17 May 2018; Egypt on 19 March 2018; Rwanda from 20 to 21 March 2018, and Saudi Arabia from 14 to 19 April 2018. In relation to each of these trips, the Registry of the Court sent a *note verbale* to the relevant State, inviting cooperation for the arrest

and surrender of Mr Al Bashir. To date, the Registry has not received replies to any of these *notes verbales*.

#### 4. ONGOING INVESTIGATIONS

##### *Current investigations*

22. Notwithstanding the ongoing challenges, the Office continues to pursue its investigations against the suspects in the Darfur situation with patience and dedication. Long-term investigation initiatives are yielding important evidence that supplements and strengthens the growing body of evidence held by the Office. In this respect, the Office welcomes the recent positive interaction with over twenty States Parties in furtherance of its investigative mandate in the Darfur situation.

23. Financial challenges faced by the Office invariably have a negative effect on the pace of the Darfur investigation, but the Office remains committed to continue to investigate and strengthen its cases by pursuing new investigative leads and collecting additional evidence.

24. As the referring body, the Council has the clear duty to encourage and facilitate financial assistance from the UN to provide the means for the Office to conduct investigations in the Darfur situation more effectively. Therefore, the Office appeals to the Council to facilitate the provision of UN funding envisaged by article 115(b) of the Rome Statute to enable it to fully pursue its investigative activity into the alleged crimes committed in Darfur.

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

25. The Office notes that reported violence against civilians in Darfur appears to have slightly decreased as compared to the last reporting period.

26. Nevertheless, during the current reporting period several clashes were reported between GoS forces and rebel groups, mainly the Sudan Liberation Army – Abdel Wahid El Nur (“SLA-AW”) in the Jebel Marra area, which is considered as the last rebel stronghold in Darfur. The Sudan Liberation Movement – Transitional Council (“SLM-TC”), a splinter faction of the SLA-AW, also reportedly clashed with GoS forces in April 2018, in the Jebel Marra area.

27. Most notably, during reported attacks by the Rapid Support Forces (“RSF”) and allied militiamen at the end of March 2018, between 11 and 16 civilians were allegedly killed, houses were burnt and hundreds of livestock were looted in the surroundings of Sawani and Rakoonna villages located in East Jebel Marra. A 25 April 2018 report of the Secretary-General on the African Union-United Nations Hybrid Operation in Darfur (“UNAMID”) to the Council noted reports of unidentified militias reportedly carrying out attacks on the area of Feina, East Jebel Marra, on 4 April 2018, which destroyed 16 villages and killed an undetermined number of civilians. The report also noted that the arrival of the RSF on the same day put a stop to the attacks.
28. These clashes, combined with attacks on multiple villages in Jebel Marra, have reportedly led approximately 80,000 persons to flee the Jebel Marra region and become internally displaced persons (“IDPs”). The Office is also concerned by reported aerial bombardments in the Jebel Marra area at the end of May which resulted in additional IDPs.
29. On 1 February 2018, the United Nations Office for the Coordination of Humanitarian Affairs (“OCHA”) stated that according to a recent update from the GoS, the number of IDPs in Darfur had decreased to 1.76 million, since approximately 386,000 had returned to their place of residence, which is mainly Darfur. The OCHA indicated that it was working with the GoS to verify the number of returnees. On this issue, the Office notes that in his 14 March 2018 briefing to the UNSC, UNAMID’s Joint Special Representative, Mr Jeremiah N. Mamabolo stressed that, despite the overall stable security situation, due to “insecurity and land occupation issues, many IDPs are not able to return to their areas of origin.”
30. In this context, the Office is highly concerned about the fate of IDPs returning to their areas of origin, especially in light of the reported decision by the GoS to close all IDP camps by the end of the year. In this regard, the Office welcomes Governor of South Darfur, Mr Adam El Faki’s decision to abandon his plan to close Kalma Camp, one of the largest IDP camps in Darfur. As stressed in its last report, the Office supports the Council’s view expressed in Resolution 2363 (2017) that any return should be “safe, voluntary and in accordance with applicable international law.”
31. While cognisant of the frequent under-reporting of sexual and gender-based violence in conflict areas, the Office notes that according to open sources, reported incidents of rape remained relatively low during this reporting period: 10 incidents were reported

involving 16 female victims of rape, the majority of whom were reportedly gang-raped by armed men.

32. However, when reporting on conflict-related sexual violence to the UNSC in March 2018, UN Secretary-General, Mr António Guterres warned that despite the “overall improvement of security conditions in Darfur”, “sexual violence remained prevalent” and “occurred around displaced persons camps.” He further noted that sexual violence has also been noted in villages and remote areas to which displaced persons have begun to return.
33. During this reporting period, students, journalists and political opponents were also reportedly targeted by the GoS. According to the 25 April 2018 Secretary-General’s report to the UNSC, as a result of the protests against austerity measures which began in January 2018, 411 protestors were arrested, including opposition activists. The Secretary-General’s report indicates that concerns were raised about these arbitrary arrests and detention of protestors in degrading conditions. Subsequently, following orders by Mr Al Bashir on 18 February 2018 and 10 April 2018, some of these political detainees were released. Nevertheless, hundreds of people reportedly continue to be arbitrarily detained in Sudan for prolonged periods of time, without being charged or given proper access to their families, lawyers or essential medical treatment.

## **5. LACK OF COOPERATION**

34. The Office, and the Court as a whole, relies on cooperation from States Parties but also from non-States Parties, to fully succeed in its mission. The nature of the cooperation that the Office seeks covers a wide range of activities, including but not limited to facilitating the collection of evidence, the freezing of assets, and assistance in the arrest and surrender of fugitives.
35. Paragraph 2 of UNSCR 1593 stresses 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.” Unfortunately, to date, the GoS’s hostile policy towards the Court in general and the Office in particular, has not wavered.
36. Despite Sudan’s non-cooperation policy, the Office can rely on the excellent cooperation provided by certain States as regards its Darfur-related investigative activities. However, as the Council is well aware, a number of States, including States Parties, continue to argue that certain political imperatives or conflicting legal



obligations trump their legal obligations under the Rome Statute in relation to the arrest and surrender of the Darfur fugitives.

37. The Office calls on the Council to find ways to take effective measures to enable the Court to carry out its mandate in Darfur, by, at a minimum: adopting a persuasive course of action against States Parties referred to the Council by the Court in its non-compliance decisions and related referrals, facilitating financial assistance from the UN and asserting the need for all States to cooperate with the Office's investigations in Darfur.

## 6. CONCLUSION

38. To conclude, the Office recalls the words of the representative of Senegal in response to its twenty-sixth report of 12 December 2017: "No peace can be built on the vestiges of impunity or failure to hold perpetrators responsible. Accountability should never be ignored as the thirst for justice for victims demands unfailing commitment on the part of every one of us."
39. The Office remains committed to its mandate to secure justice for the victims in the Darfur situation, notwithstanding the challenges arising from the lack of adequate cooperation and the many other obstacles in its path. The support of the Council for this mandate, triggered by its own resolution, remains essential, now more than ever.

| OTP