



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

INTRODUCTION

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

The Prosecutor outlines in this report the activities undertaken to implement UNSCR 1593 since the last report to the Council on 14 December 2006: the Prosecution's mission to Khartoum from 27 January to 7 February 2007; the Prosecution's application before the Pre-Trial Chamber and subsequent decision by the Judges; present investigative and monitoring activities; and efforts to secure cooperation..

The Office of the Prosecutor presented its application to the Pre-Trial Chamber on 27 February. The Office submitted that there were reasonable grounds to believe that Ahmad Muhammad Harun, former Minister of State for the Interior, and Ali Muhammad Ali Abd-Al-Rahman, otherwise known as Ali Kushayb—a Janjaweed/militia leader—joined together to persecute and attack civilians in Darfur. The Prosecution's case demonstrated how Ahmad Harun organised a system through which he recruited, funded and armed Militia/Janjaweed to supplement the Sudanese Armed Forces, and incited them to attack and commit massive crimes against the civilian population; the Prosecution's case demonstrated that Ali Kushayb was a key part of that system, personally delivering arms and leading attacks against villages. Acting together, they committed crimes against humanity and war crimes.

In its Application, the Office of the Prosecutor offered the option of pursuing first summons to appear against the two individuals, while stating that any official response of the Government of

the Sudan or the individuals showing that they would resist or fail to comply with the decision of the Court would justify the issuance of arrest warrants. The Office subsequently updated the Judges on Sudanese reactions.

After examining the application, the evidence and all information submitted by the Prosecution, the Judges delivered their decision on 27 April 2007 ; they were not satisfied that the requirements for summons to appear were met and considered that the arrest of the two individuals was necessary ; consequently they issued arrest warrants against Ahmad Harun and Ali Kushayb. In accordance with the Court's decision, the Registry is transmitting requests for cooperation to execute the warrants.

The objective is now to ensure the appearance of these individuals in Court. This major challenge requires the unconditional cooperation of all. The Security Council and regional organizations must take the lead in calling on the Sudan as the territorial State to arrest the two individuals and ensure their appearance in Court.

The ongoing situation remains alarming. There are 4 million people in need of humanitarian assistance in the region, two thirds of the population of Darfur; there are two million internally displaced people, who continue to be immensely vulnerable; there are continuing attacks against them and against international workers, as well as frequent impediments by the authorities to the delivery of assistance. Presiding over this dire situation is the same individual sought by the Court, now Minister of State for Humanitarian Affairs, Ahmad Harun.

The Office notes with concern recent allegations of crimes within the jurisdiction of the Court in Darfur. Attacks against UN, AU and humanitarian personnel are well documented. Reports allege indiscriminate and disproportionate air strikes by the Government of the Sudan that have caused destruction, loss of life and new displacement of civilians. Similarly, there are allegations of crimes committed by rebel forces.

The Darfur situation requires a comprehensive solution. The ICC is doing its part. The Office will complete its first investigation and will continue to evaluate the information about current crimes.

As the Rome Statute emphasizes, justice for past and present crimes will enhance security and send an important warning to individuals who might otherwise resort to criminality as a means of achieving their aims.

INVESTIGATION – APPLICATION TO THE JUDGES

The Office of the Prosecutor opened the investigation on 1 June 2005 and thoroughly examined allegations concerning all parties to the conflict. The Office has focussed on some of the most serious crimes and the individuals, who, according to the evidence collected, bear the greatest responsibility for those crimes. The evidence collection focussed on a series of incidents that occurred in 2003 and 2004 when the highest number of crimes were recorded.

The Office has conducted an independent and impartial investigation. To establish the truth, the Office has thoroughly examined incriminating and exonerating facts in an impartial manner. As reported before, evidence was collected from a wide range of sources, victims as well as Sudanese officials, documents provided by the Government of the Sudan and the Sudanese National Commission of Inquiry, thousands of UN International Commission of Inquiry documents, and materials generated by states, the UN Security Council, international organisations and non-governmental organisations.

Crimes within the Jurisdiction of the Court

Crimes were committed in Darfur in the context of an armed conflict between the Sudanese security forces, along with the Militia/Janjaweed against the organised rebel groups, including the Sudanese Liberation Army and the Justice and Equality Movement, from around August 2002. The conduct of the counter-insurgency campaign entered a new phase from 2003 and resulted in attacks against mainly the Fur, Masalit and Zaghawa civilian population. Acting together as part of this campaign, the Sudanese armed forces and Militia/Janjaweed carried out attacks in Kodoom, Bindisi, Mukjar and Arawala, in West Darfur, Sudan, between in or around August 2003 to in or around March 2004.

They did not target any rebel presence within these particular villages. Rather, they attacked these villages based on the rationale that the tens of thousands of civilian residents in and near these villages were supporters of the rebel forces. This strategy became the justification for the

mass murder and mass rape of civilians who were known not to be participants in any armed conflict. It achieved the forced displacement of entire villages and communities.

Named Individuals

Ahmad Harun was Minister of State for the Interior from around April 2003 to around September 2005. He currently serves as Minister of State for Humanitarian Affairs. Shortly after the April 2003 rebel attack on Al Fashir airport, he was appointed to head the “Darfur Security desk.” He had gained experience, mobilising and recruiting Militia, known as the Murahileen, to serve in counter-insurgency efforts whilst serving in Kordofan, South Sudan in the 1990s. After his appointment, Harun embarked on a strategy of recruiting and funding Militia/Janjaweed, numbering ultimately in the tens of thousands, to supplement the Sudanese armed forces. The vast majority of killings which were carried out by the Armed Forces or Militia/Janjaweed took place between April 2003 and April 2004.

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During this period, State and local Security Committees in Darfur, which were comprised of representatives of the Sudanese Army, the Sudanese Police and intelligence agencies, reported to Ahmad Harun, especially on matters relating to the staffing, funding, and arming of the Militia/Janjaweed in the context of the counter-insurgency. The most prominent of the coordination tasks entrusted to Ahmed Harun as the head of the “Darfur Security desk” was his management of, and personal participation in, the recruitment of Militia/Janjaweed. By recruiting, funding, arming and inciting the Militia/Janjaweed, with knowledge of the atrocities these armed groups would commit, and with the aim of furthering these atrocities, Ahmad Harun knowingly contributed to the commission of crimes against humanity and war crimes.

Ali Kushayb, was the “Aqid al Oqada,” or “colonel of colonels,” in the Wadi Salih locality of West Darfur. He personally led Militia/Janjaweed at the attacks upon Kodoom, Bindisi, Mukjar, and Arawala. He was involved in notorious episodes in Arawala when women were raped by men under his command. He personally participated in the execution of at least 32 men from Mukjar.

Judicial proceedings

In its decision of 27 April, the Pre-Trial Chamber determined that there are reasonable grounds to believe that the crimes described by the Prosecution have been committed, and that Ahmad Harun and Ali Kushayb bear criminal responsibility for crimes against humanity and war crimes perpetrated in Darfur during attacks upon Kodoom, Bindisi, Mukjar and Arawala.

They decided to issue arrest warrants against the two individuals for their alleged responsibility regarding 51 counts of crimes against humanity such as persecution, murder, rape and other forms of sexual violence, torture, inhumane acts, cruel treatment, outrages upon personal dignity, unlawful imprisonment, pillaging and forcible transfer of civilians and war crimes such as rape and intentionally attacking civilians and pillaging.

Current activities of the Office of the Prosecutor

The next step should be the arrest and surrender of Ahmad Harun and Ali Kushayb, and thereafter, the proceedings relating to confirmation of charges. The investigation into this case continues, in preparation for further Pre-Trial and Trial proceedings.

In parallel, to uphold its duties under article 68 (1) to protect the victims and witnesses, the Office continues to monitor the security of victims and witnesses and to implement protective measures. We have referred cases of witnesses at risk to the Registry's Victims and Witness Unit ('VWU'). The Unit, in coordination with the Office, and with the help of international partners, has taken appropriate measures to provide protection to witnesses. The Office wishes to reiterate in this context the importance of States assistance in particular through witness relocation agreements.

In addition, as indicated in the Prosecutor's December 2006 report, the Office is continuing to gather information about current crimes committed by all the parties to the conflict in Darfur and is monitoring the spill-over of violence in Chad, including in refugee camps, and in the Central African Republic, which are both States Parties to the Rome Statute.

In Darfur, the Office notes with concern allegations of indiscriminate and disproportionate air strikes by the Government of the Sudan. Throughout January, February, March and April, bombardments of some villages lasting as long as ten days have caused destruction, loss of life

and new displacement of civilians. Allegations of crimes committed by rebel forces, including against international personnel, are also being reported and analysed.

The Office is monitoring reports of attacks against internally displaced persons (IDPs) in particular the rape of women. The Office is also following local clashes, some of which are allegedly motivated by efforts to reward with land and appointments those having collaborated with the Militias. Finally, the Office continues to monitor with grave concern attacks on the AU Mission in Sudan (AMIS), as well as attacks on UN staff and international workers, such as those which occurred on 19 January in Nyala. In just over three months, between early February and May, eleven AU peacekeepers or police officers lost their lives and five were seriously wounded. In addition, numerous aid workers have been assaulted and beaten, their vehicles hijacked, their compounds looted, and some subjected to sexual violence and to mock executions. Attacks on humanitarian personnel are prohibited under international humanitarian law and constitute a war crime within the jurisdiction of the ICC. It appears that the parties to the conflict continue to violate international humanitarian law. The Office reiterates that those bearing the greatest responsibility for such crimes must be brought to justice.

In Chad, there are 232,000 Sudanese refugees, and 120,000 IDPs. The Office has gathered data on reported attacks in the villages of Tiero and Marena in Eastern Chad in late March 2007, and has monitored other alleged crimes that have taken place in 2007, including criminal attacks on or near refugee camps. Incursions from Militia/Janjaweed from the Sudan have been reported, as well as the presence of Sudanese rebels in Eastern Chad and the presence of Chadian rebels in Darfur. Any alleged crimes taking place in 2007, since Chad's ratification of the Statute came into force, are subject to the jurisdiction of the ICC.

On 22 May, my Office announced the opening of an investigation in the Central African Republic. This investigation is focussed on crimes allegedly committed in the years 2002-2003, where, in the context of an armed conflict there was a large-scale commission of crimes including killings, looting and a massive incidence of rapes and sexual violence against civilians. My Office also continues to monitor the situation in the whole of CAR, including reports of violence in the north of the country since the end of 2005. In the Northeast, on the border with Darfur, there have been incidents of violence amid some allegations of support to rebel groups from the Sudan.

ADMISSIBILITY

Since its first report to the UN Security Council on Darfur (June 2005) the Office has emphasised that the admissibility assessment is not a judgment on the Sudanese justice system as a whole, but an assessment as to whether or not the Government of the Sudan has investigated or prosecuted, or is investigating or prosecuting in a genuine manner *the case* selected by the Prosecution.

In this regard, the Pre-Trial Chamber set forth in the decision on the warrant application in the case of Thomas Lubanga Dyilo, in the situation of the Democratic Republic of Congo, that "it is a condition sine qua non for a case arising from the investigation of a situation to be inadmissible that national proceedings *encompass both the person and the conduct which is the subject of the case before the court.*" The Chamber identified a case before the Court as including "*specific incidents during which one or more crimes within the jurisdiction of the Court seem to have been committed by one or more identified suspects.*"

The Office has followed closely all accountability initiatives developed by the Sudanese authorities in connection with Darfur. It received written information from the Government and from a wide variety of public and confidential sources, explaining the nature of the Sudanese legal system generally and documenting specific matters relating to the establishment of committees, inquiries, investigations and tribal reconciliation endeavours in the context of alleged crimes in Darfur.

As reported previously, the Office has devoted important resources to making this assessment, including during 5 missions to the Sudan, gathering information on national proceedings from relevant government departments, as well as the judiciary and police service.

In December 2006, the Office reported to the Security Council that it had requested an update from the Sudanese Government on the status of its national proceedings. In a letter to the Office of the Prosecutor dated 9 December, the Sudanese Ministry of Justice reported that fourteen persons against whom prima facie evidence had been collected had been arrested in relation to incidents concerning the areas of Shattaya in South Darfur and Deleig in West Darfur. Ali Kushayb was one of those named in connection with these incidents.

From 27 January to 7 February 2007, the Office carried out a mission in Khartoum to gather information on such developments. The Prosecution met with the Minister of Justice, the Under-Secretary for the Ministry of Justice, the Chief Justice of West Darfur and the President of the Special Court for West Darfur. The Prosecution interviewed the three special advisers of the Judicial Investigations Committee (JIC). Following that mission, the Prosecution received a letter on 15 February 2007 (dated 31 January 2007) from the Minister of State for Foreign Affairs, Ali Ahmed Karti, addressing the issue of complementarity and referring again to the investigations being carried out in respect of Shattaya and Deleig.

The Sudanese authorities indicated that the JIC was also investigating crimes committed in Arawala. However, the Prosecution's investigation relates to events in or around December 2003, refers to the killing of 26 people and is characterised by particularly brutal multiple rapes and notorious examples of inhumane treatment. The JIC is investigating an incident of 5 November 2003 in relation to an unspecified number of killings. It makes no mention of rape or other inhumane treatment, and does not refer to any connection with Ahmad Harun.

The case before the Court involves two identified persons. While there are indications that Ali Kushayb is under investigation in the Sudan in relation to certain matters, the investigation does not relate to the same incidents as those investigated by the Office of the Prosecutor. Concerning Ahmad Harun, there is no indication that he is or has been subject to any criminal investigation in relation to Darfur.

The Prosecution's case is concerned with Ahmad Harun and Ali Kushayb joining together as part of a systematic and organized initiative to attack civilian populations in Darfur. There is no investigation in the Sudan into such criminal conduct. The Sudanese investigations do not encompass the same persons and the same conduct which are the subject of the case before the Court. To the extent that the investigations do involve one of the individuals named in the application, they do not relate to the same conduct which is the subject of the case before the Court. National proceedings are not in respect of the same incidents and address a significantly narrower range of conduct. The Prosecution considers therefore that the case is admissible.

In its 27 April 2007 decision, the Pre-Trial Chamber considered the issue of admissibility,

finding that, on the basis of the evidence and information provided to the Chamber in relation to both Ahmad Harun and Ali Kushayb and without prejudice to any challenge to the admissibility of the case under article 19(2) (a) and (b) of the Statute or any subsequent determination, the case against Ahmad Harun and Ali Kushayb falls within the jurisdiction of the Court and appears to be admissible.

INTERESTS OF JUSTICE and the INTERESTS OF THE VICTIMS

The Office is building on contacts previously reported with international organisations including the African Union, the United Nations, the League of Arab States as well as with local groups, NGOs and other experts engaged in Darfur to understand better the different views of local communities and to inform victims on the work of the Office of the Prosecutor and on the progress of justice.

The Court has designed an outreach strategy aimed at the affected communities. In implementing such strategy, the Registrar has travelled to neighbouring Chad, in refugee camps, to explain the Court's judicial activities and in particular the rights of victims to participate in the proceedings. During the discussions, the participants voiced their strong wish that Ahmad Harun and Ali Kushayb be arrested. Concerns were also expressed over the deteriorating security situation within the camps. Relevant Court documents have been translated into Arabic and disseminated. The Registry, in coordination with the Office of the Prosecutor, will continue to seek dialogue with victims to ensure that their interests are well-understood.

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 Organizations are urged to cooperate fully.

In its decision of 27 April, the Court decided that as soon as practicable, the Registrar shall transmit two requests for cooperation seeking the arrest and surrender of Ahmad Harun and Ali Kushayb to the competent Sudanese authorities; to all States Parties to the Statute; to all United Nations Security Council members that are not States Parties to the Statute; and to Egypt, Eritrea, Ethiopia and Libya.

The Pre-Trial Chamber's decision and the warrants of arrest have been publicly available since 1 May 2007. The Registry is proceeding with formal notification of the States identified by the Pre-Trial Chamber.

The Government of Sudan

In December 2006, the Office of the Prosecutor reported to the UNSC that the participation of the Government of the Sudan in the process so far had been important to ensure a full picture of the events in Darfur, taking into account the duty of the Office to conduct an impartial investigation.

The Office has made a number of requests for assistance to the Government of the Sudan, for access to documentation and individuals for the purpose of questioning. A degree of cooperation has been forthcoming: it included providing information in respect of particular documents from the National Commission of Inquiry, facilitating 5 missions to Khartoum and facilitating interviews including that of a senior official.

There remains however a number of outstanding requests, in particular a request to question Ahmad Harun that was formulated in November 2006 and never granted, and a similar request to question Ali Kushayb, formulated in January 2007, and never granted. Moreover, in a letter dated 15 February 2007, the Minister of State for Foreign Affairs Mr Kerti set out the Sudan's reasons for refusing to accede to such requests. He stated that as its authorities were investigating the matters relating to Darfur, they could not allow another investigation to take place on its territory. This would, it claimed, violate the rights of the accused and may also be construed as a waiver in respect of its right to challenge the issue of admissibility at a later date. The Office emphasizes that those are not grounds to refuse to allow for the questioning of witnesses under article 55 (2) of the Statute.

In its application to the Judges, the Office had considered that a summons to appear could be a first alternative pursued to ensure the appearance of the two named individuals. Under Article 58 of the Statute, the Judges may issue against individuals named by the Prosecution either warrants of arrest or summonses to appear. The Prosecution also stated at that time that any official response by the Government of the Sudan to the effect that they would fail to comply with the decision of the Chamber could justify the issuance of the arrest warrants. The Government had

the option to express its willingness to facilitate the voluntary appearance of the persons named. But by mid-April, a document was posted on the official website of the Ministry of Foreign Affairs of the Sudan, indicating that there was no intention to work with the Court. On 17 April, the Office sent a letter to the Government requesting clarification (1) on the status of the above-mentioned document, and (2) on its reaction to the filing. However, no response clarifying the Government's position has been forthcoming. On the contrary, a number of statements were made publicly to the effect that the the Sudan would not work with the Court.

In its decision on 27 April, the Court weighed independently all relevant elements and decided to issue arrest warrants. Ensuring today the execution of the Court's decision by arresting and surrendering the two named individuals is the priority. The territorial State, the Sudan, has the legal obligation and the ability to do so.

African Union

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.

The Office has met regularly with African States, including with the African group in New York, and with representatives of the African Union. The President of the Court, the Prosecutor and the Registrar briefed the AU Permanent Representatives Committee on 1 March; on this occasion, the Prosecutor briefed the Ambassadors on his investigation in Darfur. Support from the AU Presidency in this regard is gratefully acknowledged.

Shortly after delivery of this report, the Principals of the three Organs will meet with the President of the AU, Ghanaian President John Kufuor. The Prosecutor will update him on the work of the Office generally, including its activities in relation to Darfur.

Discussions are also progressing in relation to the conclusion of a Memorandum of Understanding dealing with the general relationship between the Court and the AU.

Other States and Organizations

In UNSCR 1593 (2005), the UN Security Council determined that the situation in Darfur continued to constitute a threat to international peace and security.

The Security Council referred the situation in Darfur, recognizing that justice and accountability are critical to achieving lasting peace and security. The restoration of security in Darfur is the responsibility of the Government of the Sudan and the Security Council, working with the African Union, the United Nations, the League of Arab States and other relevant organisations. A concerted, collective, coordinated effort on the part of the Government of the Sudan and the regional and international community remains essential to stop the commission of further crimes and reverse the prevailing sense of impunity in Darfur.

The Prosecutor had a useful exchange of views with Special Envoys Jan Eliasson of the United Nations and Dr. Salim Ahmed Salim of the African Union in April 2007.

The Office has recognized the importance of keeping other key partners informed of its activities in these last six months. Accordingly, the Prosecutor is regularly briefing the Secretary-General of the Arab League, as well as the Member States of the League, on the investigative and the judicial processes. Their understanding of the independence and impartiality of the Office in carrying out its legal and judicial mandate in addressing the Darfur situation is and will continue to be crucial.

CONCLUSION

The Office of the Prosecutor is now moving forward to finalise the collection of evidence to be ready for the appearance in Court of Ahmad Harun and Ali Kushayb, and the Pre-Trial Chamber hearing for confirmation of the charges against them. The key to the realisation of these next steps is the arrest and subsequent *appearance* of the two individuals. In parallel, as indicated earlier, the Office is continuing to gather information and monitor allegations of current crimes by all parties.

The Court relies on the UN Security Council, on the Member States of the United Nations, on the States Parties to the Rome Statute, and on its key partners—the UN, the African Union and the League of Arab States—to take the necessary steps and to call on the Sudan to arrest the two individuals and ensure they are brought to account before the ICC.

