



## **NINTH 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. The Prosecutor outlines in this report judicial activities undertaken since the last report on 3 December 2008, and the degree of cooperation received, or lack thereof from the Sudan and other Parties.
2. 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.
3. In April and May 2005, before opening an investigation, the Prosecution analyzed whether there were Sudanese national proceedings into the massive crimes committed in Darfur, which had already been widely documented by the Sudanese National Commission of Inquiry (NCOI), and the UN Commission of Inquiry (UNCOI). There were no such proceedings.
4. On 1 June 2005, the Prosecution opened its first investigation.
5. On 14 December 2006, in its fourth report to the UNSC, the Prosecution noted that it would finalize its first case and submit it to the Judges by February 2007, unless the Sudanese judiciary would proceed with its own investigation and trial, which it did not.
6. On 27 February 2007, the Office presented its evidence to Pre-Trial Chamber I. On 27 April 2007, the Judges issued arrest warrants against Ahmad Harun and Ali Kushayb for 51 counts of crimes against humanity and war crimes.

7. On 7 June and 5 December 2007, the fifth and sixth reports to the Council indicated that the Prosecutor was investigating an ongoing pattern of crimes committed with the mobilization of the whole state apparatus and highlighted 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. GoS officials have decided...to protect and promote Ahmad Harun”*.

8. The December 2007 report also indicated that the Office was documenting attacks by rebel factions against peacekeepers and humanitarian convoys. It noted that *“such attacks [as the attack against AU peacekeepers in Haskanita in September 2007] can constitute war crimes within the ICC’s jurisdiction”*.

9. On 5 June 2008, the Prosecution presented its seventh report, noting that the Government of the Sudan (GoS) was not complying with UNSCR 1593 and had taken no steps to arrest Ahmad Harun and Ali Kushayb.

10. The Prosecution announced that the second case, focusing on the continuing attacks aimed at the Fur, Masalit and Zaghawa, would be presented to the Judges by July 2008.

11. The report also confirmed the third case, on the Haskanita attack, noting that *“parties are targeting those who came to help civilians, the AU and UN Peacekeepers, the aid workers. Such attacks.... have a direct impact on the delivery of vital services and thereby exacerbate the suffering of vulnerable groups. They impact on the lives of thousands.... The focus of the... investigation is the 29 September 2007 attack on Haskanita...Nigeria, Mali, Senegal and Botswana lost peacekeepers... [It] appears to have been committed by rebel forces...Council Members emphasized that no effort should be spared to bring the perpetrators to justice.”*

12. On 16 June 2008, the Council unanimously adopted Presidential Statement 21: *“The Security Council takes note of the seventh briefing of the Prosecutor of the ICC pursuant to resolution 1593...recalls its decision, under Chapter VII of the United Nations Charter...that the Government of Sudan and all other parties to the conflict in Darfur shall co-operate fully with and provide any necessary assistance to the ICC and the Prosecutor... while stressing the principle of complementarity...takes note of the efforts made by the Prosecutor to bring to justice the perpetrators of war crimes and crimes against humanity in Darfur and in particular notes the follow up by the ICC with the GoS, including transmittal by the Registry of the Court to the GoS on 16 June 2007 of arrest warrants and the opening by the Prosecutor of other investigations on crimes committed by various parties in Darfur. In this respect, the Council urges the*

*GoS 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.”*

13. On 14 July 2008, the Prosecution presented its evidence to Pre-Trial Chamber I, requesting an arrest warrant against Omar Al Bashir for 10 charges of genocide, crimes against humanity and war crimes.

14. On 20 November 2008, the Prosecution presented its evidence against three rebel commanders allegedly responsible for the Haskanita attack to Pre-Trial Chamber I, comprising 3 charges of war crimes.

15. On 4 March 2009, Pre-Trial Chamber I issued its decision in the case of “*The Prosecutor vs Al Bashir*”. The Judges issued an arrest warrant for 5 counts of crimes against humanity including extermination, rapes and killings and 2 counts of war crimes.

16. On 7 May 2009, Pre-Trial Chamber I issued a first decision, under seal, in the Haskanita case, and delivered a summons to appear for rebel leader Bahar Idriss Abu Garda for 3 counts of war crimes. On 17 May, the decision was rendered public.

17. On 18 May 2009, Bahar Idriss Abu Garda surrendered voluntarily to the Court and appeared in front of the Chamber.

18. All arrest warrants and all summonses requested or issued are described above. There are no others, sealed or otherwise.

19. Implementation of UNSC Resolution 1593 needs to be integrated into the wider framework of UNSC activities on Darfur. Since March 2005, the Prosecution has kept the Security Council apprised of activities undertaken and activities planned. It has done so, respecting its judicial mandate and its duties of independence and impartiality, and respecting the mandate of others. Others, in turn, have respected its judicial mandate as given by this Council. As noted in the UN Secretary-General 8 April report on mediation, “*Where serious crimes have been committed, pursuing international justice during mediation can generate considerable tension and affect the outcome, since indicted parties may cease cooperation and actively obstruct the process. Ignoring the administration of justice, however, leads to a culture of impunity that will undermine sustainable peace. Now that the International Criminal Court has been established, mediators should make the international legal position clear to the parties. They should understand that, if the jurisdiction of the International Criminal Court is established in a particular situation, then, as an independent*

*judicial body, the Court will proceed to deal with it in accordance with the relevant provisions of the Rome Statute and the process of justice will take its course.”* The Prosecution will continue to inform all actors accordingly, allowing them to factor in the Office’s activities, the facts unveiled by its investigations, and the need to enforce the Court’s decisions in their own planning.

## **COOPERATION OF THE SUDAN AND ALL PARTIES TO THE CONFLICT**

20. Under 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.*”

21. By its Presidential Statement 21 of 16 June 2008, the Council unanimously reiterated such obligation of the GoS 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.*”

22. The Prosecution reports, as described below, that the GoS has refused to cooperate with the Court and the Prosecutor, in contradiction with UNSCR 1593 and Presidential Statement 21.

23. Other parties to the conflict, as described below, have offered a degree of voluntary cooperation.

### ***The first case***

24. On 27 April 2007, the Judges issued arrest warrants for Ahmad Harun, former Minister of State for the Interior of the Sudan and Ali Kushayb, a Militia/*Janjaweed* leader, for crimes against humanity and war crimes.

25. The warrants were transmitted to the Sudan, the territorial State, on 16 June 2007. In October 2007, the Registry requested information on the execution of the warrants of arrest from the Minister of State for Foreign Affairs of the Sudan through its Embassy in The Hague. In February 2008, the Registry again sought information on measures taken by the Sudan to execute the warrants of arrest. Each time it was intimated to the officers of the Court that following Government's instructions, documents from the Court had to be rejected.

26. In June 2007, President Al Bashir had said publicly that he would never hand over Harun to the ICC; to the contrary, Harun would continue to implement his orders. On 14 May 2008, he confirmed publicly to a gathering of

Militia/Janjaweed: *“I will not hand over Ahmed Harun or any Sudanese to ICC.”* On 9 March 2009, at a public rally in El Fasher, North Darfur, President Al Bashir reiterated his refusal to surrender Minister Harun.

27. On 26 February 2009, the Special Prosecutor for Darfur, Nimr Ibrahim Muhammad, stated that three men including Ali Kushayb had been charged in a case related to events in Deleig, Mukjar, Bandas and Garsila. On 6 May, Sudan Supreme Court judge Abdel-Rahman Sharfi stated that suspected Janjaweed Ali Kushayb could stand trial *“when there is enough evidence.”* The Government of the Sudan has not sent any information to the Court in this regard.

28. Special Prosecutor Nimr suggested in March that he may question Ahmed Harun.

29. On 22 March 2009, Minister Harun stated to Al Sharq Al Awsat that he *“was leading his life in a normal way”* and felt assured that his Head of State Omar Al Bashir would keep his word not to extradite him. Minister Harun also publicly accused both Nimr and Minister of Justice Abd-al-Basit Sabdarat of taking positions *“inconsistent with the state position refusing to deal with the ICC”*.

30. Minister Sabdarat confirmed thereafter that there are no charges against Harun. On the same day, he added that judicial prosecutions in Western Darfur were not possible: *“definitely there are war crimes in Darfur....no one can deny it...if you cannot go after the people who commit the crimes, you do so whenever circumstances become favourable and then the state can pursue those people”*.

31. Since 2005, Minister Harun has been allowed to manage humanitarian matters involving displaced persons; he made statements on 10 March concerning the decision to expel humanitarian aid workers, dismissing UN warnings that it would put thousands at risk. As of 7 May 2009, Ahmed Harun has been moved to the critical post of Governor of South Kordofan.

32. The two warrants are still outstanding. The Sudanese authorities have not cooperated with the Court for their execution.

### ***The second case***

33. On 4 March 2009, the Judges of the Pre-Trial Chamber issued an arrest warrant against Omar Al Bashir. He is charged with the war crimes of intentionally directing attacks against a civilian population as such or against individual civilians not taking part in hostilities and of pillaging. He is charged with the crimes against humanity of murder, extermination, forcible transfer, torture and rape. On 6 March, the Registry of the Court endeavoured to transmit

the warrant to the Embassy of the Sudan which, as the territorial State must arrest him. The Embassy declared that the Republic of the Sudan does not recognize the jurisdiction of the ICC and refused to receive the documents.

34. On 5 March, the day after Pre-Trial Chamber I issued the warrant, the GoS exacerbated the situation of the displaced people, already victims of the crime of extermination, by the expulsion of thirteen international aid groups working in the Sudan. They justified this measure *inter alia* by accusing the NGOs of “*collaborating with the ICC*” and stealing funds. In his 14 April 2009 report to the UN Security Council, Secretary-General Ban Ki-Moon called the decision “*an extremely negative development...the cumulative effects over time [of which] put well over 1 million people at life-threatening risk.*” He “*urge[d] the Government of the Sudan to reconsider its decision, not least bearing in mind its responsibility for the well-being and protection of its own citizens...*”

35. On 9 March 2009, Omar Al Bashir made public his disrespect for the ICC decision:” *in reference to the ICC decision they can cancel it, or they can boil it and drink the water, we are ready for you...Mark my words - the Prosecutor, his court and all its members are under my shoes*”.

36. On 10 March 2009, the Prosecution sought leave to appeal the decision not to retain the 3 genocide counts. The Appeal is pending. It has no suspensive effect on the warrant.

37. On 23 April 2009, following a meeting in Paris with French and British officials, GoS presidential assistant Nafie ali Nafie stated that “*No Sudanese, not Al-Bashir and not a non-Al-Bashir, will appear before the International Criminal Court, and we will not even send a lawyer to represent us there.*”

38. Sudanese officials have repeatedly threatened all those perceived to be cooperating with the Court. On 21 February, intelligence chief Abdallah Salah Gosh publicly warned at a ceremony celebrating his promotion to Field Marshal that anyone who would cooperate with the Court “*we will cut off his hands, head and body parts.*” Spokesman Osman al-Aghbash said on state-owned Radio Omdurman that “*The armed forces will firmly deal with whoever co-operates with the so-called International Criminal Court.*”

39. The warrant is still outstanding. The Sudanese authorities have not cooperated with the Court.

### ***The Third case***

40. The Prosecution presented its application in relation to the attack on the AU Haskanita base to the Judges of the Pre-Trial Chamber on 20 November 2008. It focuses on an unlawful attack carried out on 29 September 2007 by three rebel commanders and their forces against African Union Mission in Sudan (AMIS) peacekeeping personnel, installations, material, units and vehicles, stationed at the Military Group Site Haskanita, North Darfur. The rebel commanders were charged with the war crimes of 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.

41. The commanders charged are those who planned and led the attack. The attackers killed twelve peacekeepers and severely wounded eight others. In addition, they destroyed the communications installations, dormitories, vehicles and other AMIS materials. After the attack, the commanders personally participated in pillaging the camp and AMIS property.

42. The gravity of the crimes is related to the nature, manner and impact of the attack. An attack was intentionally directed at international peacekeepers and AMIS operations were severely disrupted, thus affecting its mission to protect millions of civilians in need of aid and security. Both this Council and the African Union (AU) emphasized the seriousness of the attack. The ICC is grateful for the cooperation received from many African States and others in support of its investigation.

43. In the instant case, the five rebel groups, parties to the conflict, Sudan Liberation Army (SLA)/Abdel Wahid, SLA Abdul Shafie, SLA/Unity, United Resistance Front (URF) and Justice and Equality Movement (JEM), publicly affirmed since 20 November 2008 their intention to cooperate with the ICC even if individuals in their ranks were sought by the Court for the Haskanita attack or other alleged crimes.

44. A first decision from the Pre-Trial Chamber was issued under seal on 7 May and made public on 17 May. The Judges delivered a summons to appear under article 58 (2) of the Statute for the President of URF, Bahar Idriss Abu Garda, for 3 counts of war crimes. The suspect voluntarily surrendered to the Court and his initial appearance in the case of "*The Prosecutor vs Bahar Idriss Abu Garda*" was held on 18 May. Bahar Idriss Abu Garda pledged full cooperation with the Court, in accordance with UNSC 1593.

45. The date of 12 October 2009 was set for the confirmation of charges hearing.

46. The Chamber decision on the other two rebel leaders is expected soon.

### ***Conclusion on cooperation***

47.UNSCR 1593 requires that the GoS and all other parties to the conflict in Darfur cooperate fully and provide any necessary assistance to the Court and the Prosecutor. Other States and Organizations are urged to cooperate fully.

48.Since 2005, the Office had endeavoured to establish a working relationship with the GoS, and the Sudan had provided a degree of cooperation up to February 2007. Judicial records were shared. Individuals were interviewed in Khartoum under article 55 of the Statute. Documents were provided to the Office under article 53 of the Statute.

49.Such cooperation by the GoS no longer exists.

50.Minister of State for Foreign Affairs Karti confirmed in March “*We want a clear rejection of the arrest warrant; trying to stop the decision [delaying it by using Rome Statue] is not what we want.*” The Minister said that his country has managed to ignore all UNSC resolutions with little repercussions as “*they amounted to nothing but ink on paper*”.

### **COOPERATION WITH OTHER PARTNERS TO PROMOTE ACCOUNTABILITY**

51.In UNSCR 1593, 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*”.

### ***Sudanese national proceedings***

52.The Court is complementary to national jurisdictions. The Office’s mandate is to investigate and prosecute those most responsible for massive crimes if the Sudanese judiciary is not doing so itself. The complementarity test under articles 17 and 19 of the Statute is whether or not the GoS genuinely investigates or prosecutes the cases selected for prosecution by the Office, namely the cases concerning Ahmad Harun and Ali Kushayb, Omar Al Bashir, and the 3 Haskanita perpetrators.

53.Since the beginning of its work in Darfur, the Office has led more than 150 missions in the Darfur situation for investigative purposes, including five to Khartoum, in large part to assess whether there were such national proceedings.

54. There was a two month preliminary examination in 2005; followed by several missions to Khartoum during 2006 and 2007 in order to assess whether there were national proceedings related to individuals and crimes being investigated by the Office. The Sudanese provided information showing that they were not conducting proceedings relevant to the ICC.

55. The special court created on 7 June 2005, after four years, has conducted no proceedings relevant to the ICC.

56. The Sudan announced two additional special courts in November 2005, and numerous committees—the Judicial Investigations Committee, the Special Prosecutions Commissions, the Committees against Rape, the Unit for Combating violence Against Women and Children of the Ministry of Justice, the Committee on Compensations. These Courts have conducted no proceedings relevant to the ICC.

57. In a 27 January to 7 February 2007 mission to Khartoum, the Office met with the Minister of Justice, the Under-Secretary for Justice, the Chief Justice of West Darfur and the President of the Special Court for West Darfur, among other officials, and met extensively the three special advisers of the Judicial Investigations Committee. The Office found no proceedings relevant to the ICC.

58. In reviewing the Prosecution's application against Ahmad Harun and Ali Kushayb, the Pre-Trial Chamber found that the case was admissible, on the grounds that there were no relevant national proceedings. As of the date of this report, Ahmad Harun, an indicted criminal, is a Governor of South Kordofan.

59. Since the issuance of those arrest warrants, the Office and the Court have received no communications from the GoS indicating any intention to investigate or prosecute the cases. The Haskanita case was not considered by the Judiciary. Rumours of prosecutions of Ali Kushayb have not materialized. Suggestions that Harun's actions may be examined have been denied by Harun.

60. In its decisions, the Court described the operational system that Omar Al Bashir directed and Ahmad Harun coordinated, using Militia/*Janjaweed* to commit crimes. The GoS is in a position to cooperate in the arrests and to stop crimes. The Prosecution has taken every opportunity to encourage the GoS to engage with the judicial process. The GoS has not done so, in spite of encouragements from all quarters.

61. To the contrary, there are consistent reports that Sudanese "suspected" of having information on crimes are threatened by the Sudanese security services.

62. The Progress Report by the Government of the Sudan to the African Union Commission dated 17 September 2008, transmitted by the AU Chairperson to the UN Secretary-General on 19 September and forwarded to this Council described the seven cases, completed by the end of 2005, by the Darfur Special Court. No case that addresses the systematic pattern of crimes committed in Darfur has been undertaken. The Special Court President himself stated to Office staff on 1 March 2006 in Khartoum that no cases involving serious violations of international humanitarian law were going for trial; the cases tried were chosen from the files of the ordinary courts. No new information is brought forward by Prosecutor Nimr Ibrahim Mohamed, appointed on 5 August 2008.

63. The new progress report to the AU forwarded to the Council on 2 February 2009 contains a paragraph on combating impunity, reading that “*The Prosecutor General for Darfur crimes together with members of the Investigation Committee conducted five visits to Darfur during which they listened to witnesses and continued investigations on incidents in Western Darfur.*” This same pattern of activities in relation to alleged crimes in Western Darfur has been reported, to the Prosecution and to others, for the last three years. There are no new developments reported.

### *African Union*

64. UNSC 1593 also invites “*the Court and the African Union to discuss practical arrangements that will facilitate the work of the Prosecutor and of the Court including the possibility of conducting proceedings in the region which would contribute to regional efforts in the fight against impunity*”.

65. The AU Peace and Security Council communiqué of 21 July 2008 “*reiterates AU’s unflinching commitment to combating impunity and promoting democracy, the rule of law ...throughout the entire continent, in conformity with its Constitutive Act, and, in this respect, condemns once again the gross violations of human rights in Darfur.*”

66. Further “*in order to address in a mutually reinforcing manner the inter-linked issues of combating impunity and promoting peace, reconciliation, [it] invites the Commission to take all necessary steps for the establishment...of an independent High-Level Panel made up of distinguished Africans of high integrity, with the active involvement of the AU and its relevant institutions and, as necessary, the support of the larger international community.*”

67. The eight-member AU panel is chaired by former President Mbeki and comprised of former Presidents Pierre Buyoya of Burundi and General

Abdusalami Abubakar of Nigeria, former Foreign Minister of Egypt Ahmed Maher El Sayed, former Minister Tiéblé Dramé of Mali, special envoy Al Haji Kabir Mohammed from Nigeria, Judge Florence Mumba from Zambia, and Director of African Rights Rakiya Abdullahi Omaar from Somalia. The panel had its inaugural meeting in Addis Ababa on 19 March 2009. They visited the Sudan and neighbouring countries and are expected to submit a report to the AU by mid July.

68. President Mbeki, as the leader of the panel, is in contact with Prosecutor Moreno-Ocampo. He has written to offer dialogue and cooperation. The Prosecutor has confirmed to President Mbeki that the ICC has conducted investigations against six individuals, including the three rebel commanders. There are no other arrest warrants, sealed or otherwise. President Mbeki's panel has the huge task *“to examine the situation in depth and submit recommendations on how best the issues of accountability and combating impunity, on the one hand, and reconciliation and healing, on the other, could be effectively and comprehensively addressed, including through the establishment of truth and/or reconciliation Commissions”*.

69. The Office recognizes the importance of a comprehensive solution for Darfur, including reconciliation and compensation, as well as moving ahead the process of accountability for other individuals involved in the commission of crimes. The Office of the Prosecutor is committed to working with President Mbeki and the AU panel toward these goals.

70. In the context of increasing co-operation relating to the work of the Court, as foreseen also in UNSCR 1593, the ICC Assembly of States Parties also recommended unanimously that the Court consider establishing a small representation at AU headquarters in Addis Ababa to enhance interaction at Summits of the African Union and on a daily basis, through contacts with AU Secretariat and States representatives accredited to the AU. The Court is working actively in this regard with AU officials.

### ***Arab League***

71. The Arab League, one of the first organizations to send a mission to Darfur, in 2004, and report the commission of massive crimes, is also active in efforts to promote accountability. Last July, following a meeting of Arab League Foreign Ministers and a visit of Secretary-General Musa to Khartoum, the GoS promised that they would continue to look into crimes through existing or new judicial committees, special courts and prosecutors; bring to justice those whom it established had taken part in crimes, regardless of the positions they held; include international crimes in the penal code, a revision of which is reportedly

under consideration, and allow legal experts from the AU, Arab League and UN the opportunity to monitor national proceedings.

72. On 7 March, Secretary-General Musa travelled to Khartoum to meet with President Al Bashir. He said that his trip to the Sudan aimed at preserving stability in the Sudan, and noted that *“there are justice concepts that we are seeking and should not be ignored.”*

## CONCLUSION

73. As the Security Council stated one year ago, the Sudan should fully cooperate with Court. They have not done so. The Prosecutor has the duty to foster cooperation with the Court and relies on this Council to assist in enhancing such cooperation as mandated in UNSCR 1593.

74. In UNSCR 1503 of 28 August 2003 relating to the *ad hoc* tribunals, this Council noted *“full cooperation by all States”* as *“an essential prerequisite to achieving the [tribunal’s] objectives”* and reflected on ways to actively target those who obstruct the arrest of indicted criminals; the Council *“urg[ed] Member States to consider imposing measures against individuals and groups or organizations assisting indictees at large to continue to evade justice, including measures designed to restrict the travel and freeze the assets of such individuals, groups, or organizations”*.

75. The Security Council might find it timely to start work on defining a framework to assist in the implementation of UNSC 1593 and the judicial decisions which have followed in relation to Darfur, and to enhance the cooperation of all parties concerned.

76. All UN member States could be called upon not to offer any political support, or financial aid to those individuals subject of an arrest warrant or to those protecting them.

77. Further, as per usual practice, UN member States should sever all non-essential contacts with indictees.