



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

INTRODUCTION

1. The present report is submitted by the Prosecutor of the International Criminal Court (ICC) pursuant to paragraph 8 of UN Security Council Resolution (UNSCR) 1593 of 31 March 2005. It outlines judicial activities undertaken since the last report on 5 June 2009, and cooperation received or lack thereof from the Sudan and other Parties.
2. On 31 March 2005, in UNSCR 1593 (2005), the Security Council determined that the situation in Sudan continued to constitute a threat to international peace and security and, acting under Chapter VII of the Charter, decided to refer the situation in Darfur since 1 July 2002 to the Prosecutor of the ICC. UNSCR 1593 provided jurisdiction to the Court.
3. In April-May 2005, the Office of the Prosecutor (OTP or “Office”) inquired whether there were Sudanese proceedings into the massive crimes committed in Darfur, which had been widely documented by the Sudanese National Commission of Inquiry (NCOI), the UN Commission of Inquiry (UNCOI) and by the Council itself. As the OTP told Sudanese officials during two exploratory meetings in The Hague, should domestic proceedings exist, the ICC as a Court of last resort would not step in. However there were no such proceedings.
4. On 1 June 2005, in the absence of national proceedings and of any prospects thereof, the Prosecution opened its first investigation.

Investigative and Prosecutorial activities to date

Prosecutor vs Harun and Kushayb

5. On 14 December 2006, in its fourth report to the UN Security Council, the Prosecution noted that it would finalize its first investigation and submit the case 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 in relation to Ahmad Harun, former Minister of State for the Interior, and Ali Kushayb, a Militia/*Janjaweed* leader. The Prosecution’s submissions offered the opportunity to the Sudan and the two individuals to cooperate with the Court, thus allowing for the issuance of summonses to appear (i.e. voluntary surrender) in lieu of arrest warrants. The two individuals declined to appear freely before the Court. As a result, 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. The Prosecution's evidence shows how Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman, otherwise known as Ali Kushayb, joined together to persecute and attack civilians in Darfur. Ahmad Harun organised a system through which he recruited, funded and armed Militia/*Janjaweed* to supplement the Sudanese Armed Forces (SAF), and incited them to attack and commit massive crimes against the civilian population. Ali Kushayb was a key part of that system, personally delivering arms and leading attacks against villages. Acting together, they committed murder, persecution, forcible transfer of population, inhumane acts, imprisonment or severe deprivation of liberty, torture, rape, outrage upon personal dignity, attacks against the civilian population, destruction of property, and pillaging.

8. The warrants of arrest were transmitted to the Sudan, the territorial State, on 16 June 2007. In October 2007 and February 2008, the Registry sought information on measures taken by the Sudan to execute the warrants. Each time it was intimated to the officers of the Court that following Government's instructions, documents from the Court were rejected.

9. On 5 June 2008, in its seventh report to this Council, the Prosecution noted that the Government of the Sudan (GoS) had taken no steps to arrest Ahmad Harun and Ali Kushayb.

10. President Al Bashir explicitly refused in public statements dated June 2007, May 2008, and March 2009 to hand over Minister Harun to the ICC, stating that Harun would continue to implement his orders. In March 2009, when Special Prosecutor for Darfur Nimr Ibrahim Mohamed suggested that he may question Harun, both he and Justice Minister Abd-al-Basit Sabdarat were accused of taking positions "*inconsistent with the state position refusing to deal with the ICC*". On 22 March 2009, Sabdarat said there were no charges against Harun.

11. From September 2005, when he was appointed Minister of State for Humanitarian Affairs, to May 2009, Harun controlled the fate of displaced persons in Darfur. On 10 March 2009, after the decision to expel humanitarian workers, he dismissed UN warnings that it would put thousands at risk.

12. As of 7 May 2009, Ahmed Harun moved to another post: Governor of South Kordofan. He remains at this post which is critical for the safety of civilians as it relates to the Comprehensive Peace Agreement, including the implementation of the Permanent Court of Arbitration's decision on the status of Abyei, and the 2011 referendum. There is no indication by the GoS that it intends to arrest him.

13. Ali Kushayb is free in South Darfur. On 26 February 2009, Special Prosecutor for Darfur Nimr Ibrahim Mohamed stated that three men including Kushayb had been charged in relation to events in Deleig, Mukjar, Bandas and Garsila. On 6 May 2009, Sudan Supreme Court judge Abdel-Rahman Sharfi stated that Ali Kushayb could stand trial "*when there is enough evidence*." But the GoS has sent no information to the Court in this regard.

14. The two warrants of arrest are still outstanding.

Prosecutor vs Omar Al Bashir

15. 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”.

16. 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.

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

18. The Prosecution submitted that President Al Bashir used the state apparatus to commit massive crimes in Darfur. He ordered that the SAF, acting in concert with the Militia/*Janjaweed*, attacked hundreds of villages predominantly inhabited by the Fur, Masalit and Zaghawa. As a consequence 2.5 million people were forced to live in camps for internally displaced people. The Prosecution presented evidence showing that President Al Bashir is subjecting these 2.5 million people to conditions of life calculated to bring about their physical destruction, including through rapes and hindering humanitarian aid.

19. 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 the crimes of extermination, rapes and killings, and 2 counts of war crimes, intentionally directing attacks against a civilian population as such or against individual civilians not taking part in hostilities and pillaging.

20. On 6 March, the Registry of the Court endeavoured to transmit the warrant to the Embassy of the Sudan, the territorial State. The Embassy declared that the Republic of the Sudan does not recognize the jurisdiction of the ICC and refused to receive the documents.

21. Following the warrant, on 5 March, the GoS expelled thirteen NGOs on the - false - accusation that they were “*collaborating with the ICC*” and threatened physical harm to anyone who would cooperate with the ICC. On 9 March 2009, President Al Bashir stated: “*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.*”

22. The one high level statement by Sudanese leaders encouraging enforcement of judicial decisions is the Juba Declaration adopted following a national dialogue on 26-30 September 2009, in which the SPLM invited all Sudanese political parties, civil society, personalities and media, which “*affirm[ed] zero tolerance to impunity from prosecution and ensure that those who have committed war crimes are brought to book before independent judiciary.*”

Appeal on Genocide counts

23. On 6 July 2009, the Prosecution appealed the decision of the Majority of Pre-Trial Chamber I that did not retain the charges of genocide against President Al Bashir. The Prosecution submitted that the Majority applied the wrong legal test to draw inferences for determining “reasonable grounds” under Article 58 of the Rome Statute. The decision imposed on the Prosecution an evidentiary burden inappropriate for this procedural stage. The Prosecution requested either that the Appeals Chamber correct the error and enter a finding that there are reasonable grounds to believe that President Al Bashir is also responsible for

three counts of genocide, or alternately that the Appeals Chamber reverse the Decision and remand the matter to the Pre-Trial Chamber for a new determination under Article 58.

24. The decision from the Appeals Chamber is pending. The appeals process has no suspensive effect on the warrant already issued for crimes against humanity and war crimes.

Prosecutor vs Abu Garda

25. In its December 2007 report to the Security Council, the Office indicated that it 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*”.

26. The June 2008 report noted that parties target “*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.(...) The focus of (...) investigation is the (...) 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.*”

27. On 20 November 2008, the Prosecution presented its evidence against three rebel commanders comprising 3 charges of war crimes to Pre-Trial Chamber I. The application focused on an unlawful attack carried out on 29 September 2007 against African Union Mission in Sudan (AMIS) peacekeeping personnel, installations, material, units and vehicles, stationed at the Military Group Site Haskanita, North Darfur. The 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.

28. 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.

29. As was done in the *Harun and Kushayb case*, the Prosecution suggested that a summons to appear could be sufficient, should the suspects cooperate. Whereas Harun and Kushayb declined the opportunity and became subjects of arrest warrants, the Haskanita suspects agreed. 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 ICC.

30. 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. Pre-Trial Chamber I considered that arrest was not necessary to ensure appearance. On 17 May, the decision was rendered public.

31. Abu Garda appeared voluntarily at the Court on 18 May 2009, in compliance with a summons. He pledged full cooperation with the Court. The OTP is grateful for the cooperation received from many African and European States including Chad, Nigeria, Mali, Senegal, the Gambia and the Netherlands during this whole process.

The Confirmation hearing

32. From 19 to 30 October 2009, Abu Garda returned to The Hague voluntarily for the confirmation of charges hearing. At the start of the hearing, he stated “*I came here because I believe in justice (...). If my presence here (...) helps in any means to improve the situation in my country, Sudan, particularly the situation of my suffering people in Darfur, and encourage others to come and cooperate with the ICC, or let others, those who have committed real crimes for our nation, our people of Darfur in Sudan, come to this Court, I will be satisfied.*”

33. The Prosecution team, headed by Deputy Prosecutor Fatou Bensouda, presented its case and three witnesses including a senior expert military witness who had participated in many UN and AU missions, and two victims from among the injured African peacekeepers. The Prosecution made presentations confirming the protected status of AMIS as a peacekeeping force and the criminal responsibility of Abu Garda in the attack.

34. Legal representatives of victims from Nigeria, Mali and Senegal also participated.

Other individuals named in the Haskanita case

35. In its November 2008 Application, the Prosecution named three individuals. The Prosecution will report further on the other two individuals in its June 2010 report.

National and other efforts to promote accountability

Admissibility of the cases

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

37. On 7 June 2005, the GoS announced the creation of a new Special Court for Darfur. In November 2005, the GoS announced the creation of two additional special courts, and 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, and the Committee on Compensations. The OTP had contact with all those mechanisms.

38. Several OTP missions went to Khartoum from 2005 to 2007. On 14 November 2005, in its introductory mission, the OTP asked to interview a number of persons in Khartoum, including Ahmad Harun. On 25 February-2 March 2006, the OTP led a second mission.

39. On 3-8 June and 14-21 August 2006, then on 27 January-7 February 2007, the OTP conducted its third, fourth and fifth missions to the Sudan. The OTP met extensively with the Minister of Justice, the Under-Secretary for Justice, the Chief Justices of the three Darfur states and the Presidents of the Special Courts, and interviewed the three members of the Judicial Investigations Committee. Verbatim records were produced. The Sudanese provided information showing that there were no relevant domestic proceedings.

40. In reviewing the Prosecution's applications against Ahmad Harun and Ali Kushayb and against President Bashir, the Pre-Trial Chamber found that the cases were admissible, on the grounds that there were no relevant national proceedings.

41. Since the issuance of those warrants, the Court has 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 refuted.

42. 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.

43. The first Progress Report by the Sudan to the African Union (AU) dated 17 September 2008, transmitted to the UN, describes 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 stated to OTP 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 ordinary courts. Prosecutor Nimr Ibrahim Mohamed, appointed on 5 August 2008, brought no new information.

44. The second Report dated 2 February 2009 states 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.*" The same information was reported to the Prosecution and others for the last four years. There are no new developments.

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

Complementary accountability efforts

46. In parallel, efforts have been made by the international community to address the impunity gap in Darfur, combining international proceeding for the most responsible, other accountability mechanisms for lower perpetrators and reconciliation processes. 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.*"

47. The League of Arab States, one of the first organizations to send a mission to Darfur in 2004, and to report on the commission of massive crimes, is active in efforts to promote accountability. In July 2008, following a visit of Secretary-General Musa to Khartoum, the GoS promised 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 was adopted, and allow experts from the AU, Arab League and UN the opportunity to monitor national proceedings. The continued involvement of the Arab League is recommended by the AU Peace and Security Council ("PSC") in its 29 October 2009 communiqué (see *infra* para 60).

48. The African Union, in July 2008, created “*an independent High-Level Panel made up of distinguished Africans of high integrity*” with the aim of addressing “*the inter-linked issues of combating impunity and promoting peace, reconciliation*”. President Mbeki, as leader of the panel, was in contact with Prosecutor Moreno-Ocampo and requested observations on the ICC activities and crimes committed in Darfur.

49. In its June 2009 report to this Council, the Prosecution noted that President Mbeki’s panel had the huge task “*to 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*” and stressed the complementary roles of the ICC and the Panel, noting “*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 Prosecutor further stressed that he was “*committed to working with President Mbeki and the AU Panel toward these goals.*”

50. The Prosecution submitted written observations to the Panel noting that “*The GoS has created judicial instruments, but not allowed them to fulfil their mandates. While the GoS faces many real challenges of resources and insecurity, the OTP found no genuine intent to bring those bearing the greatest responsibility to justice.*”

51. The submission adds “*it is a mistaken perception that ICC intervention obviates the need for other interventions. ICC intervention signals the need for more, not less commitment, from the national judiciary and international community. The ICC must be a catalyst for genuine action by the national authorities and other actors to fully address the challenge of justice.*”

52. The submission offered observations to contribute to the Panel discussion on the need for cooperation by the GoS with the ICC; accountability of lesser perpetrators through national mechanisms; stopping threats against persons reporting crimes; accountability for sexual violence; and accountability of perpetrators irrelevant of their official capacity.

53. On 7 July 2009 the Prosecutor was received by the full Panel at the headquarters of the African Union in Addis Ababa. Together they held a half day dialogue to further clarify the type of crimes investigated by the ICC, its focus on those most responsible and the role of other Courts and mechanisms to further investigate other perpetrators.

54. The report of the Mbeki Panel was presented on 8 October and adopted unanimously on 29 October at a High-Level meeting of the AU PSC in Abuja.

55. The report respects the independent, judicial mandate of the ICC while laying responsibility at the feet of the GoS to provide justice for the Sudanese. The Panel notes that “*As a result of the failings of the State in dealing with the grave situation in Darfur, faith in the criminal justice system has been severely eroded. To restore confidence and prevent impunity, a root - and branch change will be required. In particular, it will be necessary to establish an integrated system of accountability consisting of various measures and institutions working together to deal with the full range of abuses and violations that have been committed during the conflict.*”

56. The report further notes that “*The emphasis on the ICC should not distract from the reality that even at full capacity, the ICC can only deal with a handful of individuals, thus*

leaving the burden of justice to the national system. Today, Sudan, which has not ratified the Rome Statute of the ICC, continues to reject the intervention of the ICC. It cannot, however, ignore its own duty to deal with the crimes that have been committed in Darfur. The Panel considers that the priority must now be to strengthen Sudan's national legal system to deal appropriately with the perpetrators of the violations, and to make reparations to the victims inside Sudan. To date, however, the perpetrators of the serious crimes in Darfur have overwhelmingly remained unpunished and the needs for healing and reconciliation have remained largely unmet. This situation must be rectified urgently, and within the context of achieving a negotiated peace."

57. The measures proposed to this effect include *inter alia* an adequate body of substantive law, reflecting international crimes; the removal of legal and *de facto* immunities and other impediments to prosecutions, such as statutes of limitation; guarantees of fair trial, including adequate legal representation; participation of witnesses and victims in judicial processes; special measures, including legislation, for dealing with rape and other sexual crimes; measures to protect witnesses and victims participating in proceedings; appointment of sufficient qualified personnel to undertake judicial and investigative functions; training and capacity building; and coordination between courts and functions within the criminal system.

58. The Office notes the reference to the need for protecting witnesses and victims. As the Prosecution noted in the December 2006 report to the Council, "*protection of victims and witnesses has been, and remains, a paramount concern of the Office in the conduct of investigations in relation to Darfur. It is a specific statutory duty imposed on the Office and the Court, and requires a security framework for responding to emergencies threatening the safety of victims and witnesses. It is due to the absence of this framework, alongside the ongoing violence within Darfur, that the Office has conducted its investigations from outside Darfur and therefore avoided exposing victims and witnesses to additional risks.*"

59. In its communiqué of 29 October, the PSC "*Endorses the report of the AUPD [PSC/AHG/2(CC VII)] and the recommendations contained therein; reaffirms the commitment of the AU to combat impunity, in line with the relevant provisions of the AU Constitutive Act, and strongly condemns the violations of human rights in Darfur, stresses that the recommendations contained in the report of the AUPD...provide a clear and sound Road Map for achieving peace, justice, reconciliation and healing in Darfur, and thereby contribute to the overall objective of promoting sustainable peace and stability in the Sudan, and decides that these recommendations shall be the basis of AU engagement in Darfur and its interaction with its international partners; requests the Chairperson of the Commission to establish an AU High Level Implementation Panel (AUHIP), comprising of former Presidents Thabo Mbeki, Pierre Buyoya, and Gen. Abdulsalami Abubakar, to assist in the implementation of all aspects of the AUPD recommendations, and further requests the Chairperson of the Commission to undertake consultations with the UN Secretary - General and the Secretary - General of the League of Arab States, for the speedy establishment of a Consultative Forum...to receive regular reports on the implementation of the present decision and to serve as a coordinating mechanism.*"

60. On 27 October, UN-AU mediator Djibril Bassolé welcomed the AU Panel's report, calling it a "*tremendous effort*" and adding that "*dialogue between the Sudanese parties to the conflict would allow us to find the needed formula to realize peace, to improve the humanitarian situation and settle the dispute on the land and of course to achieve justice.*"

61. The Office looks forward to continuing to work with President Mbeki and the AU for implementation of the report's recommendations.

Cooperation including for the enforcement of arrest warrants

62. Under UNSCR 1593, the Security Council decided that the "*Government of Sudan and all other parties to the conflict in Darfur shall cooperate fully and provide any necessary assistance to the Court and the Prosecutor.*" Pursuant to such decision and to the Judges' orders, the arrest warrants issued by the Court in relation to the Darfur situation have been transmitted to the GoS.

63. On 16 June 2008, the Council unanimously adopted Presidential Statement 21: "*The Security Council ... 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.*"

64. In line with the approach taken by the Security Council in UNSCR 1593 and PRST 21, the Prosecution has consistently stated that, as the territorial State, the GoS had the primary responsibility and was fully able to implement the warrants, with no external interference and consistent with its sovereign authority.

65. In addition, the Prosecution has encouraged States to maintain and express public and diplomatic support to such an approach. It has asked States to refrain from offering political support or financial aid to any of the three individuals subject of an arrest warrant or to those protecting them. It has also invited UN member States to sever all non-essential contacts with those subject to ICC warrants. The Prosecutor is grateful for the actions taken by States to respect their legal obligations and follow those guidelines.

66. Over the last 6 months, States have been steadfast in regard to their legal obligations under UNSCR 1593 and the ICC Statute. During the General Debate in the UN General Assembly in October, 56 States emphasized the importance of cooperation with the Court including in relation to arrests.

67. African States Parties to the Rome Statute have affirmed both their position as AU members that the UN Security Council should consider a deferral of the Darfur investigation, and their legal duty under the Statute to execute arrest warrants should indictees be present on their territory. On 29 October in the UNGA, Kenya on behalf of the African States Parties reaffirmed this commitment to legal obligations. The Democratic Republic of the Congo highlighted in the same debate that the DRC had been the first State Party to carry out arrest warrants against its nationals, and that justice had been a factor of peace and security.

68. On 20 July 2009, President Deby of Chad, reiterated support for bringing President Bashir to justice. So did the Government of Botswana on 5 May and 24 October 2009.

69. Over the last 6 months, Prosecutor Moreno-Ocampo has met with President Zuma, Minister for International Relations Nkoana-Mashabane and Deputy Minister Ismail Ebrahim of South Africa; with President Museveni, Minister of Security Mbabazi, Minister of Defence Kiyonga and Minister of Justice Makubuya of Uganda; with Minister of Foreign Affairs Membe of Tanzania; with President Kibaki, Prime Minister Odinga and Minister of Foreign Affairs Wetang'ula of Kenya; with the Minister of Justice of the Democratic Republic of the Congo, Dr. Luzolo Bambi Lessa; and with President Kagame and Minister of Justice Tharcisse Karugarama of Rwanda. Deputy Prosecutor Bensouda met President Jammeh of the Gambia. They received firm reassertions of commitment to the Court.

70. Mexico, a UNSC member, referred on 29 October in the UNGA to the refusal of the Sudan to cooperate with the ICC, as a clear sign of GoS non-compliance with its obligations.

71. On 15 September, the EU External Relations Council adopted conclusions underlining its support for the ICC and called "*upon the GoS to cooperate fully with the ICC in accordance with its obligations under international law*".

72. President Al Bashir, at risk of arrest as he is the object of an arrest warrant, has not travelled to the territory of States Parties, whether South Africa, Uganda, Nigeria, or Venezuela. He cannot attend the UN Climate Change Conference in Copenhagen, where the Danish Foreign Ministry pointed out that Denmark will comply with UNSCR 1593. He has not attended the UN General Assembly or a Summit meeting of the OIC Standing Committee for Economic and Commercial Cooperation (COMCEC).

Analysis of crimes committed in the last six months

73. In its June 2009 statement to the Council, the Prosecution indicated that the Office would review information of ongoing crimes, focusing *inter alia* on any decision affecting the persons displaced, in particular by the Humanitarian Aid Commission (HAC); information related to acts against civilians promoted by the Ministry of Defence of the Sudan and others; and the use of child soldiers by the parties including rebel movements.

74. Over the last 6 months, the following crimes against civilians potentially falling within the jurisdiction of the ICC have been documented (i) indiscriminate bombings of civilians causing casualties and forced displacement; (ii) continued imposition of conditions of life for displaced persons including reduction of access to food, water and basic services; targeting of leaders and sheiks in camps; forced returns to unsafe areas; (iii) rapes and sexual violence constituting mental and bodily harm; and (iv) enlistment and use of child soldiers.

Attacks on civilians

75. The UN Secretary-General in its report of 13 July 2009 notes that security continues to pose "*an ongoing threat to civilians*" in Darfur.

76. Thanks to UNAMID, in comparison with the past years, there have been relatively few military operations in Darfur since June 2009. But the targeting of civilians is continuing. The SAF and the Militia/*Janjaweed* ground offensives, supported by aerial bombardments, in the Jebel Mara and North Darfur, disproportionately affected civilians, a crime under international law. Operations around Korma and Ain Siro on 17 and 18 September caused 20 civilian casualties and the displacement of at least 5,000 IDPs from an area that had been

considered as a model for reconstruction in Darfur. SAF operations against SLA/Abdel Shafie around Meilit on 28-29 September caused 28 civilian casualties, the destruction of public infrastructures and displaced 2,000 civilians. These attacks unfolded according to the pattern reported previously: indiscriminate aerial bombardments followed by SAF ground troops and Militia/*Janjaweed*, destruction and looting of civilian properties, causing the displacement of local populations.

77. In October, the UN Panel of Experts established to monitor compliance with UN Security Council resolution 1591 confirmed that Khartoum violated the ban on military air flights over the region. The Panel also emphasized that the civilian population continued to suffer from the use of disproportionate force by the SAF.

78. Insecurity also stems from inaction or involvement of law enforcement authorities in the crimes and from the culture of impunity promoted by the GoS. Insecurity rose with the 5 March 2009 decision of the GoS to expel 13 NGOs. The level of “*insecurity in (...) Darfur rose to heights not seen in a long time*” since March 2009, according to the UN.

79. The situation in the camps deteriorated, with acts of harassments multiplying. Targeted killings have taken place, and the National Intelligence and Security Services (NISS) arrested IDPs leaders and others. On 4, 5 and 6 August, at least 26 people were randomly detained in Abu-Shouk and As-Salaam camps near El Fasher and have since disappeared.

80. The report of the AU High-Level Panel on Darfur equally notes that “*Mass displacement and impoverishment has continued to be a fact of life for millions of Darfurians. The number of people residing in the IDP camps has remained stubbornly high, and although basic humanitarian conditions in the camps have been short of emergency levels for several years, people live with little dignity, with pervasive insecurity, away from their home villages. In the rural areas too, farmers and herders alike are impoverished and deprived of basic services, and vulnerable to further deprivation in the case of drought, violence or other adversities.*”

81. Of concern is loss of monitoring capacity. International organizations are denied access to rural areas where violations against the civilian populations take place away from the eyes of the international community. UN Special Rapporteur on the situation of human rights in the Sudan, Sima Samar, highlighted in her June 2009 report: “*Government clearance for flights to undertake missions have in some cases been denied especially in no fly zones, further impeding the monitoring work of human rights officers.*” Even when organizations have information, the censorship imposed by NISS and HAC obliges them to remain silent.

82. Since March 2009, when humanitarian workers were detained and intimidated by the NISS, and more than \$40 million in funds or assets extorted from them, aid personnel are more than ever under threat of expulsion for displeasing the HAC’s discretionary requirements. Aid workers speaking anonymously with journalists say they do not undertake protection work or speak openly about abuses for fear of expulsion.

83. The Panel of Experts presents a detailed analysis of the NISS structures in place to identify and punish those perceived to be collaborating with the ICC or other international bodies, in particular the Unit called “Political Circuit of the Central Security Agency”.

84. The many kidnappings also raise questions about GoS involvement. Based on intercept of communications between kidnappers, it was reported on 1 November 2009 that the

kidnapping of two staff from the Irish aid agency Goal was organized by the son of *Janjaweed* leader, currently Special Advisor to the Ministry of Federal Affairs of the GoS, Musa Hilal. The GoS has publicly warned, as did the North Darfur Governor at the end of August 2009, that it would give no security guarantee to organizations refusing its “*protection*”, a requirement contrary to the humanitarian principle of neutrality. The organizations not directly targeted by the expulsion must comply with GoS conditions or are likely to face robberies, kidnappings or carjacking by “*unknown armed men in uniforms*”, who the otherwise efficient GoS security services remain unable to arrest.

85. Consequently, some NGOs which were not expelled had to leave Darfur due to security. Remaining organizations are obliged to stretch resources. Most of the responsibility for protection thus falls on UNAMID which is extending remarkable efforts, stretching its capacities, to try to implement its mandate in IDP camps and rural areas. After the Korma and Ain Siro attacks (see *supra* paragraph 76), UNAMID attempted for two weeks to send an assessment mission but its efforts were hampered by Government delay.

Humanitarian Situation – Imposing conditions of life aimed at the destruction of communities

86. The 5 March 2009 Decision of the Government of the Sudan to expel humanitarian NGOs has jeopardized the quality standards of the aid distributed, since those expelled were the most experienced, equipped and knowledgeable working in the region. Most of them were implementing partners of UN organizations, and they left with the local knowledge and expertise which was a cornerstone of humanitarian action in Darfur.

87. As long as the policies of President Bashir, for which he has been charged by the Judge – extermination of the displaced persons, rape of the women – remain unchanged, the “*sudanization*” of humanitarian assistance, through organizations he controls, cannot be considered a laudable objective. To the contrary, it can help consolidate the extermination. After the expulsion, aid has been provided through “*band aid solutions*”. The GoS claims that the expulsion measure created no gaps. The UN differs, explaining that the humanitarian community was only able to narrow the serious gaps created in live-saving sectors.

88. The initial joint UN/GoS assessment of 24 August 2009 remains the only available comprehensive public statistics about the effects of the expulsion: 1,1 million beneficiaries of food assistance; 1,5 million accessing health services; 1,16 million receiving water and sanitation support and 670,000 persons receiving non-food items have been affected. The absence of a comprehensive assessment of the situation six months after the expulsion decision is concerning. Most humanitarian actors have lost their monitoring capacities and others are reluctant to publish figures likely to antagonize the HAC and NISS.

89. Immediate acute famine has been avoided thanks to the World Food Program’s scaled up activities and reliance on emergency/temporary distribution mechanisms. Momentary agricultural income during the rainy season has allowed IDPs to buy food. Additionally, given the international indignation created by its decision, the GoS was obliged to protect its image and took some short-term measures to fill immediate gaps through temporary budgets, but no long-term measures have been adopted. Therefore, food shortages are now documented in Thor camp in Kass, and in Gereida camp in South Darfur; in Abu Shouk, Kassab and Shaddad camps in North Darfur.

90. Shortages of water are also reported. Access to clean water has been hindered, driving IDPs to revert to unclean wells to avoid long queues in water distribution points in the camps. According to the UN, the dangers resulting from use of unclean water have been drastically increased by “*the sanitation and hygiene gap caused by the expulsion.*” Consequently, “*severe diarrhoea cases*”, which are the main cause of mortality in Darfur camps, increased and the risk of cholera outbreak is significantly higher than pre-expulsion level. Access to fundamental health services and shelter during the rainy season has been reduced by the expulsion. It is only thanks to a poor rainy season that a major health crisis has been avoided.

91. Food security, hygiene, sanitation have been severely affected. Life-savings needs are being addressed through emergency mechanisms in the short term, but the UN and others have concerns about future “*quality and standard of aid delivery*” in Darfur.

Sexual violence

92. The Office continues to be concerned about mass rape and the situation of victims of such violence. The Panel of Experts cites “*an overwhelming apathy towards, and unwillingness to investigate, acts of sexual and gender-based violence.*” Examples showing the severity of rape in Darfur include Hasa Hisa camp in Zalingei, West Darfur, where women report up to 25 incidents of rape per week during the rainy season, when they venture from the camp to engage in farming activities; Al Hamadiya camp in Zalingei, West Darfur where a woman raped in 2003 while fleeing her village was again gang-raped and stabbed on 15 May 2009 by three armed men in uniforms, while collecting firewood. The Panel documented cases of sexual assault against pregnant women and young girls, including the rape of a 12 year old, among a group of women, on 31 May 2009, and cites attacks in Kabkabiya, North Darfur, and the unwillingness of the police to help victims.

93. Following the expulsion of the NGOs, Darfur's already fragile services network for gender-based violence collapsed. Local staffers say that they feel targeted and believe that if they work with victims of rape, their organizations will be expelled. The High Commissioner for Human Rights noted the impact of the expulsion and revocation of licenses of local NGOs who were involved in psycho-social and legal support for rape victims, including the Amel Centre and the Sudan Social Development Organization (SUDO).

Forced returns

94. The return of IDPs to their place of origin is legitimate when conducted according to international law principles: voluntariness, safety and dignity. For UNHCR, a voluntary return must be based on an IDP's fully informed decision to return because the conditions that caused displacement no longer exist and because security at the place of origin has improved. It cannot be based on intimidation, incentives or other undue pressure, such as cutting off humanitarian aid. The returnee must have access to objective and up-to-date information in order to decide, and the return must be safe in both physical and legal terms. Authorities must provide assurance that the person returning does not face violence upon return; they must remove legal and administrative barriers to return and assist in the restoration of housing, land and property rights. A return finally requires a degree of material safety, *i.e.* availability of basic services, such as potable water, health and education.

95. In Darfur, these conditions are not in place. However, the GoS is still pushing for return of IDPs to their place of origin. Speaking to the UN-sponsored Miraya FM radio on 10

November, HAC Commissioner Abdel-Rahman Hasabu said the GoS plans to close down camps in the greater Darfur region by early 2010. Al-Sahafa newspaper quoted Hasabu the same day as saying that the GoS is building 20,000 housing units for IDPs in the capital towns of El-Fasher, El-Geneina and Nyala and IDPs will be given a choice to move either to their villages or to new housing complexes. He did not specify the option of refusing to return.

96. The Ministry of Defense is engaged in the implementation of such policy. The GoS justified its latest military operations in Darfur by the need for returns: on 20 September 2009, after operations in North Darfur, Governor Osman Mohammed Kebir said that the regions of Korma and Tawila had been cleared of rebels so that the internally displaced could return.

97. The GoS has also increased propaganda, explaining that the expulsion of NGOs was a needed measure because they had kept IDPs in camps with the provision of services and prevented returns. In June-August 2009 the Government ran a publicity campaign through the Sudanese Media Centre and affiliates about the construction of standard villages and the rehabilitation of basic infrastructures in Darfur, published statistics suggesting that hundreds of thousands of Darfuris had been repatriated already, and requested donors and humanitarian organizations to support governmental return programs.

98. This is done while there are no “*pulling factors*” allowing IDPs to return safely to their place of origin on a permanent basis, apart from the seasonal attraction of arable lands during rainy season. Given the absence of access by independent observers, there is no reliable information about current living conditions in rural areas of Darfur. Consequently IDPs must decide about staying in the camps or returning to their land without knowing what is waiting for them. The GoS has given no guarantee of protection upon return. Law enforcement authorities remain absent from Darfur rural areas; sources continue to report violence against returnees and GoS support to settlement of foreigners on land of IDPs.

99. The GoS resorts to ‘*repulsing factors*’ in the camps. After expelling humanitarian organizations and reducing aid through obstruction, the GoS tries to forcibly depopulate the camps by harassing sheikhs and leaders - the last source of protection available to IDPs – who refuse to participate in so-called ‘voluntary return programmes’. Three IDP leaders from El Gereida camp were arrested after they explained to a local government returns committee that they were not willing to return to their village without restoration of security, compensation and disarmament of the Militia/*Janjaweed*. The GoS has withheld aid from Fatta Borno camp in North Darfur on the pretext that the displaced should go home. GoS security forces have also blocked aid from going to Umdafok camp, in South Darfur.

Recruitment of child soldiers

100. The Office continues to be concerned about the use of child soldiers. UN Secretary-General Special Representative for Children, Radhika Coomaraswamy, visited Sudan in mid-November to assess the status of children, including the alleged use of child soldiers. The Panel of Experts highlights this practice by JEM, which “*was not able to provide evidence of adequate mechanisms that prevent the recruitment of children.*” JEM has promised since efforts to “*prevent inclusion of children within its army, including expenditures to reunite children seeking to join with their families or put them back into schools.*” The Panel also notes that the Sudanese Government is not “*transparent concerning the disarmament and reintegration of Janjaweed as demanded by Security Council resolution 1556. Therefore the Panel cannot confirm whether child soldiers formerly serving with these militia may have*

been integrated into CRP, the border guard and PDF, which all have children under the age of 18 among their ranks”.

Conclusion

101. ICC judicial activities in relation to the Darfur situation are proceeding as planned. Rebel leader Abu Garda was the first person to appear in Court in relation to Darfur. He is allegedly responsible for killing and injuring peacekeepers from Botswana, Senegal, Mali, Nigeria and The Gambia. The attack upon African Union operations in the Sudan affected millions of civilians in need of aid and security. Both this Council and the AU emphasized the seriousness of the attack and the need to bring perpetrators to justice. The decision of the Judges on the confirmation of charges is pending.

102. All arrest warrants and all summonses requested or issued by the ICC are described above in this report. Investigations continue in relation to ongoing crimes and the Prosecution will inform the Council in advance, as it did previously, should it decide to open a new case.

103. As the OTP only investigates and prosecutes a limited number of cases in relation to those most responsible, the Prosecution will continue its cooperation with other bodies, such as the AU High Level Implementation Panel, to help contribute to successful complementary accountability and reconciliation efforts.

104. The OTP is receiving decisive public support and judicial cooperation from States and international organizations in relation to its investigations, prosecutions and efforts to galvanize arrests. All efforts converge to encourage the Sudan to respect its responsibilities as a sovereign member of the UN to put an end to crimes and arrest the persons indicted.

105. The Sudan has a binding legal obligation to fully cooperate with the Court, as mandated by UNSCR 1593. It has not done so. No measure to arrest Ahmad Harun or Ali Kushayb, against whom arrest warrants were issued in 2007, has been taken. This Council in its Presidential Statement 21 had already called the attention of the GoS to the issue. The Prosecutor relies on this Council to assist further in this matter.