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*Statement to the United Nations Security Council on the
situation in Darfur, the Sudan, pursuant to UNSCR 1593
(2005)*

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Mr. President, Excellencies,

1. I thank you for this opportunity to brief the Council on the judicial activities of the Office of the Prosecutor of the International Criminal Court on Darfur.
2. Since my last report in June 2009, there have been positive developments. First, judicial proceedings in relation to the Darfur situation are progressing; second, cooperation with the African Union, the Arab League and other international bodies has been fruitful; and third, States and international organizations have maintained consistent support for the execution of the Court's arrests warrants.
3. Let me start with these three aspects.
4. First, the ICC's judicial proceedings.
5. On 19 October 2009, rebel leader Bahr Abu Garda, President of the United Resistance Front, was the first person to appear in Court in relation to Darfur crimes. My Office alleges that he is responsible for killing and injuring peacekeepers from Botswana, Senegal, Mali, Nigeria and the Gambia during the September 2007 attack of a camp of the African Union Mission in Sudan, AMIS, in Haskanita.
6. Abu Garda appeared voluntarily before the Court and presented his defence, arguing that he was not part of the attack. The Prosecution presented 552 incriminatory items of evidence and we called three witnesses to testify during the confirmation of charges hearing - two surviving peacekeepers from Nigeria and the Gambia and a senior Kenyan military expert.
7. Attacking peacekeepers is a serious crime under our jurisdiction. It affects millions of civilians in need of aid and security. Both this Council and the AU emphasized the seriousness of the Haskanita attack and the need to bring perpetrators to justice.
8. We are grateful to a number of States including Senegal, Mali, Botswana, Nigeria, the Gambia, Chad and the Netherlands that contributed to the investigation and the surrender.
9. Nigeria, an incoming member of this Council, stated on 20 November 2009 in The Hague: *"The Court's function of ensuring accountability for*

grave crimes is vital for the maintenance of lasting international peace...Cooperation is critical in enhancing the effectiveness of the ICC [...] Nigeria is presently assisting the Court in the prosecution of those involved in [...] the Haskanita killing of peacekeepers in Darfur, by giving the Court access to witnesses."

10. Let me add that 78 victims from Nigeria, Mali and Senegal participated in the proceedings.
11. The decision of the Judges on the confirmation of charges is expected within two months.
12. In this and the other cases, my Office is continuously taking measures to protect our witnesses. As you are aware, individuals - falsely - suspected of providing evidence to the ICC have been arrested and tortured in Khartoum. There are public threats by the Sudanese authorities against anybody who cooperates with the Court in the investigations in Darfur.
13. However, to date, no ICC witness has been harmed or identified.

Mr. President, Excellencies,

14. There are also positive developments in our cooperation with institutions that can complement the intervention of the ICC, and promote additional proceedings for other perpetrators as well as truth and reconciliation mechanisms. This is the comprehensive approach defined by this Council in Resolution 1593 which "*encouraged the Court [...] to support international cooperation with domestic efforts to promote the rule of law, protect human rights and combat impunity in Darfur*", and which emphasized "*the need to promote healing and reconciliation [...] in order to complement judicial processes*". This is the approach we have followed.
15. The League of Arab States, which reported on the commission of massive crimes in Darfur as early as 2004, is active in efforts to promote justice in Darfur. At the initiative of the Secretary-General Amr Musa, international crimes have been included in the Sudanese penal code.
16. President Mbeki, as head of the African Union High-Level Panel, contacted me upon taking office and requested information on ICC activities and on crimes committed in Darfur.

17. My Office submitted written observations to the Panel. We noted that the Government of the Sudan had created multiple judicial instruments and courts, but never allowed them to fulfil their mandates. The Panel shared this analysis in its own report, stating 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.”*
18. On 7 July 2009, I was received by the full Panel at AU headquarters in Addis Ababa. We held a half day dialogue. It was then clarified that the cases against President Al Bashir, Ahmad Harun and Ali Kushayb as well as Abu Garda and two other rebel commanders will be decided by the Judges of the International Criminal Court. Additionally, we had exchanges on the complementary role that other courts can play to investigate other perpetrators.
19. The Panel’s report respects the independent judicial work of the ICC, and recognizes the need to do more, not less justice efforts for Darfur; more, not less cases. As the Panel rightly notes: *“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”*. The Panel thus adopted a comprehensive solution, combining the current ICC cases with the possibility to have other courts for other perpetrators, if and when the conditions for such courts to operate effectively are created.
20. This last point is key. As the Panel notes: *“To date [...] the perpetrators of the serious crimes in Darfur have overwhelmingly remained unpunished and the need for healing and reconciliation has remained largely unmet. This situation must be rectified urgently.”* The Panel proceeds to list a series of prerequisites which are needed before this situation can be rectified, stressing that no genuine proceedings can take place before the Sudan: (i) removes official immunities; (ii) adopts special measures for dealing with rape and sexual crimes; and (iii) ensures protection of witnesses. It is not just a matter of setting up new courts. It is a matter of creating a framework allowing these courts to operate effectively and independently.
21. On 29 October, a High-Level meeting in Abuja of the AU Peace and Security Council endorsed the report and its recommendations. It established an Implementation Panel, comprising former Presidents Thabo Mbeki, Pierre Buyoya, and Abdulsalami Abubakar. The Office of the Prosecutor is ready to assist the Panel in its endeavours.

22. Council members have also expressed in past sessions the need to pursue an integrated approach in Darfur, with justice, security, political negotiations and humanitarian aid. I want to report to this Council that all the actors working on those different aspects, including the Prime Minister of Qatar, as chair of the Arab-African Ministerial Committee, UN-AU mediator Djibril Bassolé, and the Arab League Secretary General. Is remarkable they demonstrate that engagement with the Government of the Sudan in political negotiations on Darfur is possible while recognizing President Al Bashir individual responsibility for the crimes committed and respecting the Court's decisions.

Mr. President, Excellencies,

23. There are also positive developments to report regarding the cooperation of States, including for the execution of ICC arrest warrants. The Court is receiving decisive public support. Efforts to galvanize arrests are going forward.

24. The warrants of arrest have been transmitted to the Sudan. This Council in UNSCR 1593 of March 2005 and Presidential Statement 21 June 2008 insisted on the duty of the Sudan to cooperate fully with the Court. Ending crimes and arresting individuals on Sudanese territory is a primary responsibility of the Sudanese Government. The Government of the Sudan has both the legal duty and the ability to do so.

25. All efforts in recent months have converged to encourage the Sudan to respect its responsibilities as a UN member State, to put an end to crimes and arrest the persons sought by the Court.

26. During the UN General Assembly debate in October, 56 States emphasized the importance of cooperation with the Court, including in relation to arrests. On 29 October, Kenya on behalf of the African States Parties reaffirmed this commitment to their legal obligations with no reservations.

27. 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.

28. Over the last six months, myself and Deputy Prosecutor Bensouda met with many African Presidents, President Zuma of South Africa, President Museveni of Uganda, President Jammeh of the Gambia, President Kibaki of Kenya, President Deby of Chad. All of them expressed their commitment to justice and to ending impunity.
29. During the General Assembly debate, Mexico referred to the refusal of the Sudan to cooperate with the ICC, as a clear sign of the Sudan's non-compliance with its obligations; Peru and Bolivia indicated that, upon receipt of the warrant, they activated national procedures to ensure the arrest of President Al Bashir, should he set foot in their countries.
30. On 15 September, the EU External Relations Council adopted conclusions calling *"upon the Sudan to cooperate fully with the ICC in accordance with its obligations under international law"*.
31. President Al Bashir, at risk of arrest, has not travelled to the territory of States Parties for high level events which he was planning to attend in South Africa, Uganda, Nigeria, or Venezuela. He cannot attend the UN Climate Conference in Copenhagen. He has not attended the UN General Assembly or, recently, a meeting of the OIC Committee for Economic and Commercial Cooperation.
32. This process of marginalization of indicted criminals, if maintained steadfastly, is a way towards the ultimate implementation of the arrest warrants issued by the Court. Respect for the Court decision to issue an arrest warrant against President Al Bashir sends a clear message: President Al Bashir will face justice. Any leader committing crimes will face justice. Power does not provide immunity. There was no immunity for President Milosevic, there was no immunity for President Taylor, there was no immunity for Prime Minister Kambanda.

Mr President, Excellencies,

33. There are also negative developments in two areas. The lack of cooperation of the Sudan, and the continuation of crimes.
34. The Sudan has refused to cooperate with the Court. In UNSCR 1593, this 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". The warrants were transmitted to the Sudanese Government.

35. President Al Bashir has refused to appear in Court. He has refused to appoint a lawyer to represent his position. He has refused to arrest Ali Kushayb and Ahmad Harun. Ahmad Harun is now the Governor of Kordofan. This is all in non compliance with this Council's decisions.
36. Instead, over the last six months, President Al Bashir has continued using the Sudanese state apparatus to conduct a diplomatic and communication campaign against the Court; he has endeavoured to shift the attention of the international community to other pressing issues, the conflict with the South in particular. He will exacerbate such conflict if it can shift your attention from the crimes committed in Darfur and from his criminal responsibility.
37. As the Prosecutor, I will deal with any judicial challenge brought by President Al Bashir and other suspects in Court. But I will need the full support of the Council to ensure that the attention remains on the need to arrest the persons who are the object of arrest warrants and on the need to end crimes in Darfur.
38. Crimes are continuing. There are still indiscriminate bombings of civilians causing casualties and forced displacement; continued imposition of conditions of life to exterminate displaced persons including hindering of humanitarian aid and expelling of assistance providers with the obvious consequence of reducing access to food, water and services; rapes and sexual violence constituting mental and bodily harm; and use of child soldiers.
39. As recently as last week, on 25 November, there were reports of Militia/*Janjaweed* attacks against Al Harra and Jabel Issa, two villages in North Darfur, in which civilians were captured, villagers beaten and properties looted.
40. In order to increase for predictability, I want to report that my Office continues to review information in four main areas.
41. First, acts affecting the persons displaced, committed in particular by the Humanitarian Aid Commission or HAC. On 10 November 2009, HAC Commissioner Hasabo announced that the Sudanese Government would close the camps for the displaced by early next year, without guarantees of access to food or water and without

guarantee of security. Sheiks in camps who oppose returns to unsafe areas are targeted. Let me clarify that any forced return of displaced persons can constitute a new crime within our jurisdiction.

42. Second, acts against civilians in the camps, including rapes, by the forces of President Al Bashir.
43. Third, the use of child soldiers. The recent report by Mrs Coomaraswamy indicates that both the Sudanese armed forces and the rebels recruit children.
44. Fourth, as our investigation into the case of President Al Bashir demonstrated that he used the State apparatus not only to commit massive crimes, but also to dissimulate them, and therefore facilitate their continuation, my Office is considering the criminal responsibility of Sudanese officials who actively deny and dissimulate crimes. They do not benefit from any immunity under the Rome Statute. Since Nuremberg, due obedience is no longer a legal excuse for the commission of crimes.

Mr President, Excellencies,

45. Let me conclude.
46. On 4 March 2009, the Judges of the ICC ruled that the policy adopted by President Al Bashir against two and half millions Sudanese citizens in the camps constituted extermination as a crime against the humanity. The Appeals Chamber is considering whether the charges of genocide should be added.
47. President Al Bashir, instead of stopping the crimes, is stopping the information about the crimes. The decisions to expel humanitarian workers and silence others by threats of expulsion, or the attempts at restricting the freedom of movement of UNAMID are part and parcel of this policy to reduce the monitoring capacity of the international community.
48. In his 23 November report, the UN Secretary-General accused the Government of the Sudan of breaching UNAMID's Status of Forces Agreement by placing impediments on the movement of peacekeepers. UNAMID, which is the last international presence able to keep a protective eye on camps and rural areas and to report on rapes and sexual violence.

49. As the Prosecutor, my mandate is to investigate and prosecute those responsible for crimes in order to contribute to the prevention of future crimes. I am ready to answer any challenge in Court, but I will need the full support of the Council to contribute to the end of the current crimes against the people from Darfur.

50. Thank you.