



EIGHTH 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 cooperation, investigative and monitoring activities undertaken since the last report on 5 June 2008.

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-May 2005, the Prosecution analyzed information on the existence of Sudanese national proceedings into massive crimes committed in Darfur. There were none.

4. On 1 June 2005, the Prosecution opened the first investigation.

5. Pursuant to UNSC 1593, the Prosecution reports every six months to the Council, on actions taken and on upcoming activities. On 29 June and 13 December 2005, the first two reports set out the manner by which the Office assesses the initiation of an investigation as well as the process for the selection of incidents and the identification of those bearing the greatest responsibility for these incidents. On 14 June 2006, the third report identified key crime patterns, including peaks in violence and trends, such as large-scale massacres, mass rape, and deliberate targeting of the Fur, Masalit and Zaghawa. In particular, the report indicated: *“There is ...evidence to suggest that the civilian population was forcibly displaced from their homes, in a widespread and systematic manner, for reasons not related to the conflict, and that those populations were denied the opportunity to return...thousands of civilians have died since 2003 as a consequence of the conditions of life.... These include a lack of shelter and basic necessities for survival as a result of the destruction of homes, food stocks, and the looting of property and livestock, as well as obstacles to the provision of life-saving humanitarian assistance. This type of ‘slow death’ has particularly affected the most vulnerable groups, including children, the elderly and the sick.”*

6. On 14 December 2006, the fourth report noted that *“The Office is completing... the collection of sufficient evidence to identify those who bear the greatest responsibility for some of the worst crimes in Darfur”* and *“is seeking to finalise the preparation of the submission to the*

Judges by February 2007. On 27 February 2007, the Office presented its evidence. On 27 April 2007, the Judges issued arrest warrants against Ahmad Harun and Ali Kushayb.

7. On 7 June and 5 December 2007, the fifth and sixth report to the Council indicated that the Prosecutor was investigating the criminal responsibility of those continuing to commit atrocities in Darfur. The December report described *"an ongoing pattern of crimes committed with the mobilization of the whole state apparatus"*. It 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"* and that *"The Office of the Prosecutor will proceed with its investigations in this regard."* The report also identified the attack against AU peacekeepers in Haskanita as a matter of concern.

8. 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. Both were free and active in the Sudan. The Office announced that the second case, focusing on the continuing attacks aimed at destroying the Fur, Masalit and Zaghawa, would be presented to the Judges by July 2008, and that the third case would focus on those who target peacekeepers, in particular the September 2007 rebel attack on the AU base at Haskanita.

9. The report noted that *"different parties are targeting those who came to help civilians, the AU and UN Peacekeepers, the aid workers. Such attacks can constitute war crimes within the ICC's jurisdiction; they also 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 present focus of the Office investigation is the 29 September 2007 attack on Haskanita...Nigeria, Mali, Senegal and Botswana lost peacekeepers during that attack. The Haskanita incident appears to have been committed by rebel forces...Council Members emphasized that no effort should be spared to bring the perpetrators to justice."*

10. On 16 June, 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."*

11. On 14 July 2008, the Prosecution presented its case against President Omar Al Bashir to Pre-Trial Chamber I, comprising 10 charges of genocide, crimes against humanity and war crimes. The Judges will rule shortly on the Prosecution request for an arrest warrant.
12. On 20 November 2008, the Prosecution presented its case against three rebel commanders allegedly responsible for the Haskanita attack to Pre-Trial Chamber I, comprising 3 charges of war crimes.
13. All three Prosecution cases remain admissible. There are no proceedings in the Sudan against Ahmad Harun and Ali Kushayb, against Omar Al Bashir, or against the three rebel commanders of the Haskanita attack.
14. The two outstanding arrest warrants must be executed.
15. States must also prepare for the Judges' upcoming decision in the case of *The Prosecutor vs Al Bashir*. In the event of the issuance of an arrest warrant, the Sudan as the territorial State must arrest and surrender him. Moreover, all UN Member States must uphold UNSCR 1593 and ensure the implementation of the Court's decision.
16. Regarding the Haskanita case, the Prosecution has noted the statements by five rebel groups which are party to the conflict that they will cooperate fully with the Court.
17. Finally, the Prosecution, as mandated by this Council, continues to monitor and investigate ongoing crimes, including attacks against displaced persons as well as attacks and threat thereof against humanitarian and peacekeeping personnel.
18. Since March 2005, the Prosecution has kept the Security Council apprised of activities undertaken and activities planned so as to allow States to adjust to the legal framework and it will continue to do so. All arrest warrants requested or issued are described above. There are no others.
19. As UN Secretary-General Ban Ki-Moon stated on 10 July, "*peace and justice should go hand in hand.*" For this reason, the Prosecution engages regularly with the UN, the African Union (AU), the League of Arab States and its Arab-African Ministerial Committee, including the co-chairs, Qatari Prime Minister H.E. Sheikh Hamad Bin Jassim Bin Jabr Al Thani, Secretary-General Amr Musa and Chairperson Jean Ping.
20. In all interactions, the Prosecutor explained the Office's prosecutorial policy, which is independent, impartial and transparent, and focuses on the crimes, on the evidence, and on the individual responsibility of the most serious perpetrators. There was a consensus that decisive action is needed to end crimes in Darfur.
21. The Prosecution emphasizes that execution of arrest warrants requires concrete decision-making. The GoS, as the territorial State, has the legal duty and the capacity to

execute the warrants. But the Council, States, the UN and regional organizations in accordance with UNSCR 1593 must act to ensure such arrests by severing all non essential contact with individuals indicted by the Court; by denying such individuals any political and economic support including by way of adopting individual travel bans and the freezing of personal assets.

JUDICIAL PROCEEDINGS

The first case

22. On 27 February 2007, the Prosecutor presented its first case in the Darfur situation. On 27 April 2007, the Judges have 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. The warrants are still outstanding. The investigation continues in preparation for further Pre-Trial and Trial proceedings.

The second case

23. On 14 July 2008, the Prosecution requested the Judges of the Pre-Trial Chamber to issue an arrest warrant against Mr Omar Al Bashir. He is charged with war crimes, crimes against humanity and genocide. On 1 October, the Chamber held a closed hearing with the Prosecution as part of its consideration of the application. On 15 October, the Chamber submitted written questions. The Prosecution filed its response by 17 November. The decision of the Judges is pending.

24. In Darfur, over the years, President Al Bashir developed a policy of destroying three ethnic groups he perceived as threats, the Fur, Masalit and Zaghawa. They challenged the economic and political marginalization of their region, and members of the groups engaged in armed rebellion. He assessed that the entire groups, not just the combatants, were the source of the rebellion. As stated by Harun *"because the sons of the Fur became rebels, the Fur and whatever they have become booty for the mujahideen."* The goal was not simply to defeat the rebellion, but to destroy these ethnic groups

25. Mr. Al Bashir as President of the Republic of the Sudan and Commander in Chief of the Armed Forces exercises both *de jure* and *de facto* authority. He provided strategic directions to the operations against the civilians in Darfur. While he delegated authority to his subordinates, supreme responsibility was always his. He ensured the coordination of operations through the State administration and through Locality and State Security Committees reporting to him. He participated personally in the recruitment and direction of Militia/Janjaweed incorporated into reserve forces. The events that occurred in Darfur, in particular their scale, their systematic and planned nature could not have occurred without his approval and will.

26. In March/April 2003, after both negotiation and military action failed to end the conflict in Darfur, President Al Bashir publicly instructed the army to quell the rebellion in two weeks; he identified the civilians with the rebels and gave orders not to *"bring back any prisoners or wounded."* He declared that he wanted *"only scorched earth"*, triggering brutal attacks against villages inhabited by the Fur, Masalit and Zaghawa. His statements described the concept of operations that the Armed Forces and the Militia/Janjaweed would carry out over the ensuing months and years: neither military action against the rebel forces themselves nor political negotiation but total destruction of the ethnic groups which, according to him, were at the origin of the rebellion.

27. President Al Bashir replaced key individuals such as the Governor of North Darfur who warned against the dangers of using Militia/Janjaweed and appointed others such as Harun. Local prosecutors received instructions from Khartoum not to intervene.

28. His instructions had a direct impact on the ground. On 30 April 2003, senior GoS officials met in Al Fashir. In the name of President Al Bashir, the "Al Fashir Declaration" proclaimed: *"We hereby remind everyone that all the preparations, equipment, vehicles and measures needed to complete the task and take matters in hand have been put in place ... Everything, from aircraft, armoured vehicles and riding animals, to weapons and supplies, has been made ready to resist and stand against the opposition. Indeed regular, peoples' and armed volunteer forces are at the ready to stand firm and complete the task."* President Al Bashir's subordinates, whether high officials or Militia/Janjaweed perpetrators, always insist that they act on his behalf.

29. President Al Bashir's forces focused their attacks on civilians in towns and villages inhabited mainly by the Fur, Zaghawa and Masalit, forcing their displacement to hostile terrain and then continued to target them in the camps for internally displaced persons (IDPs) occupied mainly by members of the three groups. Invoking his command, attackers told victims that *"the Fur are slaves, we will kill them"; "You are Zaghawa tribes, you are slaves"; "You are Masalit. Why do you come here, why do you take our grass? "*

30. The land occupied by the Fur, Zaghawa and Masalit defined the target. The attackers went out of their way to spare villages inhabited by other groups. For example in Habila, Wadi Salih and Mukjar, 97% of predominantly Fur villages were attacked and destroyed or abandoned and 85% of predominantly Masalit villages were attacked and destroyed or abandoned, while less than 1% of other villages were attacked.

31. The victims of attacks carried out across Darfur were not only forcibly displaced to IDP camps during a 'peak of violence'. The attackers destroyed all means of survival of the groups, thus ensuring that there was no possibility to come back to villages whether at crop period or at any time, and that for the group there was no possibility to reconstitute. It made the groups entirely dependent on aid which was then hindered and cut them off from the *"dar"*, the land and villages constituting their identity.

32. The attacks against villages have followed a common pattern for more than five years, from March 2003 to the present. The Armed Forces in concert with Militia/Janjaweed kill men, women, children and the elderly; they subject women and girls to rapes. They burn residential dwellings and community facilities including schools and mosques. They burn crops, poison sources of water including wells, steal livestock. As a result, at least 2,700,000 people have been forcibly expelled from their home. Survivors were pursued into deserts, killed or left to die. 2.5 million people managed to reach IDP camps or refugee camps in Chad or Central African Republic.

33. The targets are not rebel forces, but civilians in villages where rebels are not present, and absent any valid military objective. Attacks do not cease until the village as an entirety has been victimised. Attacks by President Al Bashir's forces on the displaced persons in and around camps are aimed at civilians, as shown by the systematic raping of women. Girls as young as 5 are raped. A third of the victims of rape are children.

34. There were instances that President Al Bashir's forces bypassed locations with rebel presence, instead choosing to attack civilians. During attacks by the Armed Forces and Militia/Janjaweed in Wadi Salih and Mukjar in August 2003, the attackers knew that the rebels were in the Sindu Hills, but instead of attacking the Hills, they attacked civilians in Kodoom, Bindisi and Mukjar where there was no rebel presence. In July 2003, Al Bashir's forces knew that rebels were in Disa village, where no civilians were present. Instead of attacking Disa, the commander, upon orders from Khartoum, directed the Armed Forces and Militia/Janjaweed to attack all Zaghawa villages in the area, where there were only civilians, and no rebels.

35. Almost the entire population of the target groups has been forcibly displaced. Data from refugee camps in Chad and IDP camps within Darfur confirm that most of those displaced belong to the Fur, Masalit and Zaghawa.

36. President Al Bashir completed his plan by usurping their land, now occupied by new settlers from other tribes more supportive of the Government and often affiliated with Militia/Janjaweed. A victim was told: *"this land is liberated and you have no land and no right to cultivate on liberated areas"*. Removal from the land is destructive of the Fur, Masalit and Zaghawa groups as such. Finally, he ensured that those displaced into camps continued to be subjected to physical and psychological harm, killings, rapes, kidnappings, denial of humanitarian assistance and other conditions that would bring about their destruction.

37. As indicated in January 2005 by the United Nations Commission of Inquiry (UNCOI), *"there would be no policy of genocide if 'the populations surviving attacks on villages ...live together in areas selected by the Government...where they are assisted'"*. But the evidence shows that the victims, far from being assisted, continue to be attacked in the camps.

38. Militia/Janjaweed, who Al Bashir recruited, armed, and purposefully failed to disarm, are stationed in the vicinity of camps. Women and girls going to collect firewood, grass or water are repeatedly raped by Militia/Janjaweed and other GoS agents: *"when we see them, we run. Some of us succeed in getting away, and some are caught and taken to be raped -- gang-raped. Maybe around 20 men rape one woman[...These things are normal for us here in Darfur"]*.

39. Babies born of these assaults, termed "Janjaweed babies," are not accepted as members of the community. A victim explains: *"they kill our males and dilute our blood with rape. [They]...want to finish us as a people, end our history"*.

40. The mental harm caused by rape is compounded by the impunity afforded to perpetrators. As depicted by a victim: *"those who rape you wear fatigues and those who protect you wear fatigues. We don't know any more who to run from and who to run to."* Rape is an integral part of the pattern of destruction. As described by the ICTR in the Akayesu case, rape is used to *"kill the will, the spirit, and life itself"*.

41. Insecurity organized in and around the camps by Al Bashir's agents, including the Humanitarian Aid Commission (HAC), exacerbates fear. Unable to rely on their own Government for protection, victims turn to local leadership for support. But as soon as leaders, Sheiks, speak up, they become targets. There are numerous examples of arrests and killings of camp leaders.

42. Although the Sudan is economically viable and even exporting food, President Al Bashir and his subordinates systematically refuse to provide meaningful Government aid, and hinder other efforts to bring humanitarian aid to the displaced. The Ministry of Humanitarian Affairs and the HAC within the Ministry, in association with the intelligence and security apparatus, have blocked the publication of nutrition surveys, delayed the delivery of aid, expelled relief staff denouncing such acts, denied visas and travel permits, and imposed unnecessary bureaucratic requirements on aid workers. This has the effect of reducing nutrition and access to medical services for protracted periods of time. Thus Fur, Masalit and Zaghawa are subjected, at best, to a subsistence diet and the reduction of essential medical services below minimum requirements, conditions calculated to slowly bring about their physical destruction.

43. President Al Bashir's forces and agents killed outright at least 35,000 civilians in attacks on villages. With the conditions imposed during displacement and in the camps by his forces and agents, the international community has already witnessed the "slow death" of between 80,000 and 265,000 people. And it continues.

44. Charges of crimes against humanity have also been brought to represent the full extent of criminal activity in Darfur since 2003. Murder, rape, forcible displacement and extermination were committed against Fur, Masalit, Zaghawa and smaller ethnic groups such as the Tunjur, Erenga, Birgid, Misseriya Jebel, Meidob, Dajo and Birgo.

45. In the context of the armed conflict in Darfur, President Al Bashir also committed the war crimes of attacking civilians and pillaging towns and villages, including Kodoom, Bindisi, Mukjar, Arawala, Shataya, Kailek, Buram, Muhajeriya, Siraf Jidad, Silea, Sirba, Abu Suruj, and Jebel Moon.

Individual responsibility

46. President Al Bashir committed the crimes through members of the state apparatus, the army and the Militia/Janjaweed. He is President of the Republic of the Sudan, Head of the National Congress Party and Commander in Chief. He appoints the Governors of all the States of the Sudan. He sits at the apex of, and personally directs, the State's hierarchical structure and the integration of the Militia/Janjaweed within.

47. President Al Bashir ordered the incorporation of the Militia/Janjaweed into reserve forces while maintaining the illusion of their autonomy and disguising the conflict as a tribal one that had nothing to do with State forces. This illusion, together with the reality of his control over their acts, helped him to conceal his criminal responsibility and to carry out genocide in the face of international scrutiny.

48. His control of the state apparatus as reflected in the formal hierarchy is reinforced in fact by an elaborate network of reporting lines. He regularly receives reports of the crimes committed from Ministers, Governors, military officers and Militia/Janjaweed. The acts of destruction are committed because President Al Bashir so intends.

49. He ensures that all components of the GoS, the Armed Forces and the Militia/Janjaweed work together: (i) the Locality and State Security Committees - to assist in planning and to coordinate implementation of activities in Darfur; (ii) the Military Intelligence and National Intelligence and Security Service to provide support to the Armed Forces and Militia/Janjaweed and to facilitate usurpation of the land; (iii) the Ministry of Interior - to mobilize the Militia/Janjaweed into reserve forces and ensure that the police would not protect civilians; (iv) the Ministry of Defence, including the Armed Forces and Militia/Janjaweed - to carry out attacks against civilians; (v) the Ministry of Humanitarian Affairs - to obstruct the delivery of aid to IDPs, ensure destitution and insecurity in and around the camps and physically and psychologically abuse the IDPs; (vi) the Ministries of Information and Communication and of Foreign Affairs - to pursue a campaign of misinformation, concealing the crimes and the responsibility of President Al Bashir; (vii) the Ministry of Finance - to fund the Militia/Janjaweed and to ensure that limited funds go to the IDPs; (viii) the Judiciary - to conduct sham investigations and pretend that crimes are prosecuted.

50. President Al Bashir gives impunity to those following his orders, such as Ahmad Harun who said that the President had given him the power to kill whoever in Darfur and that he was "*ready to kill 3/4 of Darfur in order to allow 1/4 to live*". Harun coordinated the attacks against the villages in 2003-2005. Since September 2005, he is responsible for

the camps. He is a key element of the attacks on the villages and the attacks on the camps. In June 2007, the President publicly said 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 Haroun or any Sudanese to ICC."*

51. Instead of investigating and punishing the perpetrators of genocide, President Al Bashir conceals the crimes, labelling as *"fabrications"* photographs of thousands of burned villages. On 19 March 2007, on the issue of rapes, he said that *"It is not in the Sudanese culture or people of Darfur to rape. It doesn't exist. We don't have it"*.

The Haskanita application

52. The Prosecution has concluded its third investigation into the Darfur case. The application in relation to the attack on the AU Haskanita base was presented to the Judges of the Pre-Trial Chamber on November 20. The Prosecution has requested the issuance of arrest warrants for 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.

53. The crimes charged focus on an unlawful attack carried out on 29 September 2007 by three rebel commanders and their forces against the African Union Mission in Sudan (AMIS) peacekeeping personnel, installations, material, units and vehicles, stationed at the Military Group Site Haskanita, Umm Kadada Locality, North Darfur.

54. The commanders planned and led the attack. They commanded forces of around 1,000 men in a convoy of vehicles mounted with heavy weapons, to attack the AMIS peacekeepers. The attackers killed twelve (12) peacekeepers and severely wounded eight (8) others. In addition, they destroyed the communications installations, dormitories, vehicles and other AMIS materials. After the attack, the commanders personally participated, alongside their forces, in pillaging the camp and AMIS property including approximately 17 vehicles, as well as refrigerators, computers, cellular phones, military boots and uniforms, fuel, ammunition and money.

55. Intentionally directing attacks against personnel and property involved in a peacekeeping mission in accordance with the UN Charter are war crimes, as long as the personnel and property are entitled to the protection given to civilians and civilian objects under international humanitarian law. AMIS was a peacekeeping mission authorized in accordance with the Charter through UNSCR 1556 of 30 July 2004 and subsequent resolutions. The purpose of AMIS was *"to monitor and observe compliance with the Humanitarian Ceasefire Agreement of April 8, 2004 and all such agreements in the future, to assist in the process of confidence building, and to contribute to a secure environment for the delivery of humanitarian relief and, beyond that, the return of IDPs and refugees to their homes, in order to assist in increasing the level of compliance of all Parties with the HCA and to*

contribute to the improvement of the security situation throughout Darfur.” AMIS personnel were not participating in any combat activity at the time of the attack.

56. Gravity and complementarity requirements of the Statute are met. The gravity of the crimes is related to the nature, manner and impact of the attack. An attack was intentionally directed at international peacekeepers, 12 of whom were killed and 8 wounded; AMIS operations were severely disrupted, thus affecting its mission to protect millions of civilians in need of humanitarian aid and security. Both this Council and the AU emphasized the seriousness of the attack on MGS Haskanita. Such attacks constitute violent crimes of exceptionally serious gravity and consequences for the victims and for the international community. There are no national proceedings in relation to the case.

57. 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 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.

ONGOING CRIMES - ACTIVITIES OF THE OFFICE OF THE PROSECUTOR

58. The Office continues to monitor ongoing crimes in Darfur. Genocide continues. Women and girls are still raped systematically in and around the camps. This is happening now, as documented *inter alia* by the 17 October report of the UN Secretary General. Youths are killed if leaving the camps.

59. On 25 August in Kalma, Sudanese government forces entered the camp, reportedly to disarm IDPs, killed 31 displaced persons and wounded 65. In the confrontation which lasted 2 hours, GoS forces were heavily armed and IDPs, mostly belonging to the Fur group, carried sticks and spears. On 10 September, the Office sent a letter to the GoS, asking information on “*national investigations or prosecutions planned or underway in relation to the events of 25 August where Sudanese civilians, internally displaced in the Kalma camp in South Darfur have been the victim of killings and other abuses.*” There has been no response.

60. On 10 September, the Central Reserve Police attacked Zam Zam camp, looted a market, shot and seriously injured 7 people. According to the UN, “Most premises were poke-marked by bullets and some houses were burnt down.”

61. Peacekeepers and other personnel endeavouring to bring security and aid to the displaced are also targeted. In May-July, there were at least 15 attacks or threats against UNAMID, including the murderous 8 July attack near El Fashir on a joint UNAMID military/police patrol team. The perpetrators, on board 40 vehicles mounted with heavy machine guns and anti-aircraft weapons, sustained a three hour attack which resulted in the death of 7 peacekeepers and the injury of 22 others.

62. One week later in West Darfur, a UNAMID peacekeeper was killed by unknown gunmen in 5 vehicles who tried to hijack his vehicle, and shot him when he resisted.

63. In August and September, rebels fired on a UNAMID helicopter that they reportedly mistook for a GoS aircraft. The GoS failure to stop painting its aircraft white, the customary colour of UN aircraft, has been separately reported by the UN and others.

64. On 4 August, a civilian convoy was ambushed on the Nyala-El Fashir road by men on camels, suspected to be Militia/Janjaweed, leaving 6 dead and 28 wounded. Due to insecurity, NGO suspended operations in camps in a number of instances over the last months. Following an attack on a WFP convoy near Nyala on 3 September, the organization could not account for 69 trucks and 43 drivers. Drivers are refusing to ply certain routes, a situation which slows food aid deliveries. WFP had started cutting rations since May as a result of the insecurity.

65. On 19 September, the UN Secretary-General expressed concern about GoS aerial bombardments of civilian areas. UN Special Rapporteur Sima Samar noted on 2 September *"In the first three weeks of July 2008 there were 21 separate incidents...air strikes were carried out by the Government of Sudan with Antonov aircrafts and MIG fighter jets... the strikes impacted in the vicinity of civilian communities and allegedly resulted in the deaths of 12 persons, including 5 women and 2 children...civilian objects, in particular cultivated land and livestock, were also destroyed."* In November the GoS continued to bomb civilians in violation of a days-old promised ceasefire by President Al Bashir. The villages of Dairi Shagi and Oum Al-Wadi (North Darfur) were reportedly destroyed and thousands forced into the desert.

66. Finally, the Office is monitoring statements potentially inciting to violence such as that of Sudanese Presidential Adviser Bona Malwal on 25 July, in reference to peacekeeping forces, that *"We are telling the world that with the indictment of our president al-Beshir we can't be responsible for the well-being of foreign forces in Darfur."* UN Special Representative for Sudan, Ashraf Qazi, reported to the Security Council on 18 August that the Government had conveyed that the issuance of an arrest warrant against President Bashir could have serious consequences for UN staff and infrastructure in Sudan. At a session of the solutions committee of the Darfur People's Initiative Adam Hamid Musa, recent governor of South Darfur, announced and threatened that there will be *"more genocide like it has not seen before by anyone"*, if Bashir is indicted. President Bashir himself said in an official televised speech on the Prosecution's case that *"we are not looking for problems, but if they come to us then we will teach them a lesson they won't forget."*

ADMISSIBILITY

67. The Court is complementary to national jurisdictions. This concept is often misunderstood. The Office is not mandated to assess the Sudanese judicial system as a whole, or to monitor judicial proceedings in the Sudan; this is the mission of others. In

this regard, the contribution of the AU and Arab League and others to the promotion of accountability mechanisms in the Sudan is essential. Each victim — man, woman or child — in Darfur should be offered an opportunity in a Court of law to secure justice.

68. The Office's mandate is distinct; the Office is to investigate and prosecute those most responsible for massive crimes if the Sudanese judiciary is not doing so itself.

69. The complementarity test is whether or not the GoS has genuinely investigated or prosecuted, or is genuinely investigating or prosecuting the cases selected for prosecution by the Office, namely the cases concerning Ahmad Harun and Ali Kushayb, Omar Al Bashir, and the Haskanita perpetrators.

70. Furthermore, it is the responsibility of the GoS, or the individual concerned, should they assess that such national investigation or prosecution exist, to come to the ICC and challenge the admissibility of the case. This cannot be done through the media or through the reports of intermediaries. It can only be done through proper legal channels. Finally, the decision rests with the ICC Judges.

71. In the instant case, the application of the complementarity test under the Statute is straightforward. The Office led 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. There was nothing.

72. The GoS announced the creation of a new special court on 7 June 2005, after the Prosecution's announcement of the opening of the first investigation. After more than three years, it has conducted no proceedings relevant to the ICC.

73. 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. After three years, they conducted no proceedings relevant to the ICC.

74. 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 interviewed the three special advisers of the Judicial Investigations Committee. The Office found no proceedings relevant to the ICC.

75. In reviewing the Prosecution's application against Ahmad Harun and Ali Kushayb, the Pre-Trial Chamber made a preliminary finding 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 Minister of State for Humanitarian Affairs of the Sudan and continues to enjoy impunity.

76. 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. Media rumours and promises of prosecutions of Ali Kushayb, have not materialized. While the Sudanese authorities claim that they will investigate and prosecute, there are instead consistent reports that Sudanese “suspected” of having information on crimes are threatened by the Sudanese security services in foreign countries, and in Khartoum, thus demonstrating that concealing crimes remains the priority for the GoS.

77. The Progress Report by the Government of National Unity of the Republic of the Sudan “GoNU” 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 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 himself stated to Office staff regarding these same cases 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.

78. In relation to the case against President Al Bashir, the GoS has never given any indication that it has considered investigating or prosecuting the alleged crimes.

79. In relation to the Haskanita case, the GoS has not indicated in its September 2008 report or elsewhere that it has investigated those responsible for the attack on AMIS.

INTERESTS OF JUSTICE, INTERESTS OF THE VICTIMS, OUTREACH

80. The Office continues to seek views of affected communities and inform victims on its work. Darfurian communities in Africa, Europe and America have shared with the Office petitions also addressed to the UN, the AU and others, voicing their support for the implementation of Court’s decisions.

COOPERATION

81. 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.

The Government of the Sudan

82. Since 2005, the Office had endeavoured to establish a working relationship with the GoS and noted in its 2007 application to the Judges and in previous reports to the Council that the Sudan had provided a degree of cooperation. Since the issuance of the arrest warrants in 2007, that cooperation no longer exists.

83. In its April 2007 decision, the Court described the operational system that Ahmad Harun coordinated, using the Militia/Janjaweed to commit crimes. The GoS was in a position to cooperate in the arrests and to stop the crimes. They decided to deny the crimes and protect the indictees. The situation has not changed since June 2008.

84. The Prosecution has taken every opportunity to encourage the GoS, the indicted persons and persons against whom arrest warrants are sought to engage with the judicial process. The GoS has not done so, in spite of encouragements from all its partners. President Al Bashir has the legal means to defend himself through the judicial process, and he has the authority to stop the crimes. Instead he places on others, GoS partners, the responsibility to protect him, while the genocide continues.

85. President Al Bashir, personally or through his subordinates, claims that the Court is attacking Africa, affecting peace, and affecting victims and international personnel as there could be retaliation against them if he is indicted. The facts are that victims of crimes committed in Darfur are 3 million African citizens; that justice will promote peace in Darfur, as determined by UNSCR 1593, reasserted in Presidential Statement 21 of June 2008; UNAMID, for all its efforts, cannot bring safety to civilians when the most serious perpetrators still hold official positions in Khartoum, and continue to implement a criminal strategy. Finally, threats against victims, peacekeepers and aid workers should be seen for what they are – criminal intent – and not rewarded with promises of impunity.

African Union, League of Arab States, European Union

86. The AU pursued efforts to ensure that justice is done for Darfur. The 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.”*

87. Further *“in order to address in a mutually reinforcing manner the inter-linked issues of combating impunity and promoting peace, reconciliation, Council...[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, to examine the situation in depth and submit recommendations.”*

88. On 23 July, following a meeting of Arab League Foreign Ministers and a visit of Secretary-General Musa to Khartoum, the GoS made a series of promises: its judiciary would continue to look into crimes through existing or new judicial committees, special courts and prosecutors; it would bring to justice those whom it established had taken part in crimes, regardless of the positions they held; legislators would include international crimes in the penal code, and legal experts from the AU, Arab League and UN would have the opportunity to monitor national proceedings. It is recalled the Arab League was one of the first organizations to send a mission to Darfur, in 2004, the report from which recognized the commission of massive crimes. A new mission of the League is in Khartoum during this first week of December.

89. All such efforts are essential as the ICC cannot investigate and prosecute all crimes committed in Darfur. All victims in Darfur deserve justice.

90. On 11 July, Deputy Prosecutor Fatou Bensouda briefed the AU Peace and Security Council in Addis Ababa, and met with Chairperson Ping. On 9-10 August 2008, Mrs Bensouda met in Botswana with President Festus Mogae and Attorney General Molokomme. Botswana Minister for Foreign Affairs stated at the UNGA: *"We fully support the work of the Court....The ICC was established with the support of African States...The court is meant to serve a specific purpose and there should be no exceptions as to what it can or cannot do"*. The Deputy Prosecutor also spoke with President Sirleaf Johnson of Liberia.

91. On 11 August, the Prosecutor met President Wade in Dakar and discussed cooperation in relation to Darfur. The support of Senegal—the Rome Statute's first State Party— is invaluable. In September, the Prosecutor met with the Sierra Leone Minister of Foreign Affairs and the Ministers of Justice of Rwanda and Kenya. The Minister of Justice of South Africa, visiting the Court on 8 September, was briefed by the Prosecutor on Darfur.

92. In New York in September, the Prosecutor met with Sheikh Al Thani, Qatar's Prime Minister and Minister of Foreign Affairs; Bernard Bembe, Minister of Foreign Affairs of Tanzania and Jean Ping, Chairperson of the AU Commission. He was invited to attend the first consultations of the Arab Ministerial Committee set up to arrange peace talks between the GoS and the armed movements in Darfur, chaired by Sheikh Al Thani, and co-chaired by Secretary-General Amr Musa and Chairperson Ping. The Committee meeting was attended by the Ministers of Foreign Affairs of Syria, Saudi Arabia, Egypt, Libya, Algeria and Morocco as well as Tanzania, Senegal and Burkina Faso. The Office respects their role in bringing a comprehensive solution to Darfur.

93. Consultations have been fruitful. The Office appreciates statements made at the Assembly of States Parties of the ICC on 14-15 November by Tanzania on behalf of the AU (*"The fact that all four of the Court's current situations are in Africa, three of which were self-referrals, is not a negative reflection on the continent...it illustrates the high regard that these States have for the protection and promotion of the rule of law...The important role played by international criminal justice, as embodied by the work of the Court and similar criminal tribunals...in establishing respect for the rule of law, thus bringing about peace...in conflict-torn*

societies, is one of the great achievements of our time") and by the Arab league ("se joignant à la communauté internationale dans la commémoration du 10ème anniversaire...du statut de Rome, la Ligue désire rappeler que ses Etats membres figuraient à la tête des pays à avoir soutenu la création de cet édifice de la justice pénale internationale et appeler par la même à assurer les garanties permettant au tribunal d'accomplir sa mission en toute neutralité et indépendance, et de remplir ses fonctions en toute impartialité....La paix et la justice vont de pair, on ne peut réaliser l'une sans garantir l'autre ").

94. The Office will pursue such consultations. The Assembly of States Parties recommended that the Court consider the desirability and feasibility of establishing a small representation at AU headquarters in Addis Ababa to enhance interaction.

95. The Office continues to consult with EU High Representative for the Common Foreign and Security Policy Javier Solana, EU Special Representative for Sudan Torben Brylle and their staff.

United Nations

96. The Office continues to consult with UN Secretary-General Ban Ki-Moon, heads of the Office of Legal Affairs Patricia O'Brien and of Peacekeeping Operations, Alain Le Roy and UN Special Rapporteur on the Situation of human rights in the Sudan Sima Samar.

CONCLUSION

97. There are two arrest warrants outstanding in the Darfur case. Further decisions will be taken soon by the Judges. As the Security Council stated in June, all States should fully cooperate with Court. Massive crimes are committed and exposed. It must inform our actions from this day forward.

98. 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".

99. Similar action must be considered in the upcoming months in order to ensure the implementation of all the Court's arrest warrants in relation to Darfur.

100. Consistent support for the enforcement of the Court decisions is required in any bilateral or multilateral activity.

101. No political support, no financial aid should be provided to those individuals subject of an arrest warrant or those protecting them. For those assisting the indictees, individual travel bans and freezing of assets should be considered as appropriate.

102. States should sever all non-essential contacts with indictees. An indicted person travelling on the territory of an UN member State should be arrested and surrendered to the Court. There is no immunity on account of rank or official position before the International Criminal Court for persons against whom warrants of arrest have been issued by the Judges of this Court.