

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

No.: ICC-02/05-01/20

Date: 22 October 2021

**TRIAL CHAMBER I**

**Before:**

**Judge Joanna Korner, Presiding Judge  
Judge Reine Alapini-Gansou  
Judge Althea Violet Alexis-Windsor**

**SITUATION IN DARFUR, SUDAN**

**IN THE CASE OF**

***THE PROSECUTOR v. ALI MUHAMMAD ALI ABD-AL-RAHMAN ('ALI  
KUSHAYB')***

**Urgent  
Public  
With Public Annex V  
Confidential Annexes I, III and IV, and  
Confidential Annex II *EX PARTE* available to the Registry and Defence  
  
Registry's Second Report on the current status of cooperation  
with the Republic of Sudan**

**Source: Registry**

**Document to be notified in accordance with regulation 31 of the *Regulations of the******Court to:*****The Office of the Prosecutor**

Mr Karim A.A. Khan  
Mr Julian Nicholls

**Counsel for the Defence**

Mr Cyril Laucci  
Mr Iain Edwards

**Legal Representatives of the Victims**

Ms Natalie von Wistinghausen  
Mr Nasser Mohamed Amin Abdalla

**Legal Representatives of the Applicants****Unrepresented Victims****Unrepresented Applicants  
(Participation/Reparation)****The Office of Public Counsel for  
Victims**

Ms Paolina Massidda

**The Office of Public Counsel for the  
Defence****States' Representatives****Amicus Curiae****REGISTRY****Registrar**

Mr Peter Lewis

**Counsel Support Section**

Mr Pieter Vanaverbeke

**Victims and Witnesses Unit**

Mr Nigel Verrill

**Detention Section****Victims Participation and Reparations  
Section****Other**

## I. Introduction

1. On 15 September 2021, Trial Chamber I (“Chamber”) instructed the Registry to “submit a report on cooperation with Sudan, including from a legal and operational viewpoint, no later than 22 October 2021.”<sup>1</sup>
2. Pursuant to that instruction, the Registry hereby submits its second report on the current status of cooperation of the International Criminal Court (“Court” or “ICC”) with the Republic of Sudan (“Sudan”).
3. In light of the Chamber’s instruction for the Defence to “liaise with the Registry” on the issues regarding cooperation with Sudan and the security assessment conducted by the Court’s security experts,<sup>2</sup> the Registry also submits information pertaining to its communication with the Defence.

## II. Procedural History

4. On 12 April 2021, the Registry submitted its first report on the status of cooperation with Sudan.<sup>3</sup>
5. On 10 May 2021, the Registry concluded the “Agreement on the Cooperation between the International Criminal Court and the Government of the Republic of The Sudan” (“Cooperation Agreement”).
6. On 19 May 2021, the Registry submitted an addendum to its first cooperation report.<sup>4</sup>

---

<sup>1</sup> Email from Trial Chamber I to the Registry, 15 September 2021 at 09:22.

<sup>2</sup> Status conference of 8 September 2021, ICC-02/05-01/20-T-013-ENG, lines 17-20, p. 42.

<sup>3</sup> Registry, “Registry’s Report on the current status of cooperation with the Republic of the Sudan”, 12 April 2021, ICC-02/05-01/20-339-Conf-Exp.

7. On 1 September 2021, the Defence submitted observations<sup>5</sup> pursuant to the Chamber's order scheduling the first status conference on 8 September 2021.<sup>6</sup>
8. During the status conference of 8 September 2021, the Chamber ordered *inter partes* communication between the Defence and the Registry on the issues regarding cooperation with Sudan and the security assessment conducted by the Court's security experts.<sup>7</sup>
9. As referred to in paragraph one above, on 15 September 2021, the Chamber instructed the Registry to submit the present report.
10. On 12 October 2021, the Defence submitted a request asking the Chamber to, *inter alia*, order the suspension of all activities of the parties, participants and the Registry in Sudan.<sup>8</sup>

### III. Classification

11. Pursuant to regulation 23bis(2) of the Regulation of the Court ("RoC"), annexes I, III and IV to the present report are classified as confidential as they refer to communications between the Registry and the Sudanese authorities and to the Court's security assessment which reveals the locations in Sudan where the Court is conducting its activities. Annex II to the present report is classified as confidential *ex parte* only available to the Registry and the Defence as it refers to the Defence requests for cooperation.

---

<sup>4</sup> Registry, Addendum to the "Registry's Report on the current status of cooperation with the Republic of the Sudan" dated 12 April 2021 (ICC-02/05-01/20-339-Conf-Exp), 19 May 2021, reclassified as confidential on 12 July 2021, ICC-02/05-01/20-397-Conf.

<sup>5</sup> Defence, "Observations de la Défense en vertu de l'Ordonnance ICC-02/05-01/20-451", 1 September 2021, ICC-02/05-01/20-461.

<sup>6</sup> Trial Chamber I, "Order scheduling first status conference", 16 August 2021, ICC-02/05-01/20-451.

<sup>7</sup> Status conference of 8 September 2021, ICC-02/05-01/20-T-013-ENG, lines 17-20, p. 42.

<sup>8</sup> Defence, "Requête aux fins de mesures urgentes visant à préserver la sécurité des témoins, des victimes et des autres personnes à risque du fait des activités de la Cour, y compris son personnel, au Soudan", 12 October 2021, ICC-02/05-01/20-485-Conf.

#### IV. Applicable Law

12. The following provisions and legal texts are of particular relevance to the present submissions: the United Nations Security Council Resolution 1593 (2005) dated 31 March 2005 (“UNSC Resolution”); Part 9 of the Rome Statute (“Statute”), particularly articles 86, 87(1), (2) and (3) and 93(1) of the Statute, rules 13 and 20(1)(b) of the Rule of Procedure and Evidence, and the 10 May 2021 Cooperation Agreement.

#### V. Submissions

##### A. Legal framework for Sudan’s cooperation obligations

13. According to article 13(b) of the Statute, the Court may exercise its jurisdiction with respect to article 5 crimes, in accordance with the provisions of this Statute, if a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the UN Security Council acting under Chapter VII of the UN Charter.

14. On 31 March 2005, the UN Security Council, acting under Chapter VII of the UN Charter, adopted the UNSC Resolution in which, having determined that “the situation in Sudan continues to constitute a threat to international peace and security”,<sup>9</sup> the UN Security Council referred the situation in Darfur since 1 July 2002 to the Prosecutor of the ICC. In the UNSC Resolution, the UN Security Council also decided that “the Government of Sudan and all other parties to the conflict in Darfur shall cooperate fully with and provide any necessary assistance to Prosecutor pursuant to this resolution”.<sup>10</sup> Sudan, on the

---

<sup>9</sup> UN Security Council Resolution 1593 (2005), Preamble.

<sup>10</sup> *Ibid*, para. 2.

basis of article 25 of the UN Charter, is obliged to accept and carry out the decisions of the UN Security Council.<sup>11</sup>

15. The UN Security Council's referral provides for the legal basis for the ICC's mandate to operate in Sudan. Where the UN Security Council refers situations in non-States Parties, the binding UN Security Council resolution adopted under Chapter VII of the UN Charter provides for the legal basis for the ICC's competence, thereby obviating the need for the consent by the territorial State to the exercise of jurisdiction.<sup>12</sup> The UNSC Resolution gives the Court the power to exercise its jurisdiction over the situation in Darfur, in Sudan, in accordance with the Statute and it creates an obligation on Sudan to fully cooperate with the Court.<sup>13</sup>

16. This view is supported by the Appeals Chamber which held in the case of *The Prosecutor v. Omar Hassan Ahmad al-Bashir* that "in case of a referral by the UN Security Council, the Court is bound by the provisions of the Statute. This includes the cooperation regime which is regulated in Part 9 of the Statute".<sup>14</sup> In the Appeals Chamber's view, given that the UN Security Council resolution does not provide for a separate regime of cooperation, "cooperation by a State

---

<sup>11</sup> Appeals Chamber, *The Prosecutor v. Omar Hassan Ahmad al-Bashir*, "Judgement in the Jordan Referral re Al-Bashir Appeal", 06 May 2019, ICC-02/05-01/09-397, para. 140; see also Pre-Trial Chamber II, *The Prosecutor v. Abdel Raheem Muhammad Hussein*, "Decision on the Prosecutor's request for a finding of non-compliance against the Republic of the Sudan", 26 June 2015, ICC-02/05-01/12-33, para. 12.

<sup>12</sup> Registry, "Registry's Observation on the 'Requête en vertu des Articles 4-2 et 68-1 du Statut'", 15 January 2021, ICC-02/05-01/20-258-Conf, paras. 7 and 11; see also Pre-Trial Chamber II, *The Prosecutor v. Omar Hassan Ahmad al-Bashir*, "Decision under article 87(7) of the Rome Statute on the non-applicability by Jordan with the request by the Court for the arrest and surrender of Omar Al-Bashir", 11 December 2017, ICC-02/05-01/09-309, para. 37; see further W. Rüdert, Article 4, Legal status and powers of the Court, in: Triffterer, Otto (Ed.) [Commentary on the Rome Statute of the International Criminal Court](#). (Munich: Beck, 2008) (3rd edition), p. 108.

<sup>13</sup> Appeals Chamber, *The Prosecutor v. Omar Hassan Ahmad al-Bashir*, "Judgement in the Jordan Referral re Al-Bashir Appeal", 06 May 2019, ICC-02/05-01/09-397, para. 7; see also Pre-Trial Chamber II, *The Prosecutor v. Abdel Raheem Muhammad Hussein*, "Decision on the Prosecutor's request for a finding of non-compliance against the Republic of the Sudan, 26 June 2015, ICC-02/05-01/12-33, para. 12; see further Registry, "Registry's Observation on the 'Requête en vertu des Articles 4-2 et 68-1 du Statut'", 15 January 2021, ICC-02/05-01/20-258-Conf, para. 10.

<sup>14</sup> Appeals Chamber, *The Prosecutor v. Omar Hassan Ahmad al-Bashir*, "Judgement in the Jordan Referral re Al-Bashir Appeal", 06 May 2019, ICC-02/05-01/09-397, para. 135.

following a referral by the UN Security Council must either follow the rules provided for States Parties (article 86 et seq. of the Statute) or the more limited regime for States not parties to the Statute (article 87(5) of the Statute)".<sup>15</sup> The Appeals Chambers concluded that:

"In the view of the Appeals Chamber, the fact that Sudan is obliged to fully cooperate with the Court, as per Resolution 1593, means that the cooperation regime for States Parties to the Rome Statute is applicable to Sudan's cooperation with the Court, and not article 87(5) of the Statute. This is because the latter regime is clearly inappropriate for a State that actually has a legally binding duty to cooperate with the Court. Therefore, exercise of jurisdiction by the Court 'in accordance with [the] Statute' means, in relation to cooperation by Sudan, cooperation on the basis of the regime established for States Parties to the Statute."<sup>16</sup>

17. It follows that, as regards cooperation obligations, Sudan is in analogous position to a State Party to the Rome Statute. According to the Appeals Chamber, "the applicable cooperation regime is that for States Parties, as the one for States not parties to the Rome Statute is clearly inappropriate and a 'third' regime does not exist".<sup>17</sup> Consequently, by virtue of the UN Security Council resolution, "Part 9 of the Statute and the relevant Rules governing State Party cooperation become applicable vis-à-vis Sudan".<sup>18</sup> The Appeals Chamber further clarified that "'full cooperation' in accordance with the

---

<sup>15</sup> *Ibid*, para. 137.

<sup>16</sup> *Ibid*, para. 141; see also paras. 138-140.

<sup>17</sup> *Ibid*, para. 142.

<sup>18</sup> Pre-Trial Chamber II, *The Prosecutor v. Abdel Raheem Muhammad Hussein*, "Decision on the Prosecutor's request for a finding of non-compliance against the Republic of the Sudan, 26 June 2015, ICC-02/05-01/12-33, para. 13; see also Pre-Trial Chamber II, "Decision on Defence requests and procedural challenges", 21 May 2021, ICC-02/05-01/20-402, para. 38; see further Pre-Trial Chamber II, "Decision on the Defence request pursuant to article 87(5)(b) of the Statute, 9 March 2021, ICC-02/05-01/20-295, para. 10.

Statute encompasses all those obligations that States Parties owe to the Court and that are necessary for the effective exercise of jurisdiction by the Court”.<sup>19</sup>

18. The Court also concluded with Sudan the Cooperation Agreement which entered into force on 10 May 2021. The Cooperation Agreement, which is legally binding under international law,<sup>20</sup> specifies Sudan’s cooperation obligations in accordance with the Statute. It facilitates the fulfilment of the Court’s mandate within the territory of Sudan in the context of the present case. It provides all necessary provisions which should enable the Court, including the Defence, to carry out its activities in the territory of Sudan, including the provisions on the privileges and immunities of the Court, its personnel, including the Defence, as well as victims and witnesses. These are standard provisions based on the “Agreement on the Privileges and Immunities of the International criminal Court”, which are normally included in cooperation agreements with situation countries.<sup>21</sup>

## B. Cooperation with Sudan

19. Since 2010 when the Office of the Prosecutor (“Prosecution”) submitted a request for a finding on the non-cooperation of the Government of the Sudan in the case of *The Prosecutor v Ahmad Harun and Ali Kushayb*,<sup>22</sup> the Registry has

---

<sup>19</sup> Appeals Chamber, *The Prosecutor v. Omar Hassan Ahmad al-Bashir*, “Judgement in the Jordan Referral re Al-Bashir Appeal”, 06 May 2019, ICC-02/05-01/09-397, para. 143.

<sup>20</sup> See Draft Articles on the law of treaties between States and international organizations or between international organizations with commentaries, 1982, pp. 17-18, available at [https://legal.un.org/ilc/texts/instruments/english/commentaries/1\\_2\\_1982.pdf](https://legal.un.org/ilc/texts/instruments/english/commentaries/1_2_1982.pdf), last consulted on 20 October 2021.

<sup>21</sup> The Agreement on the Privileges and Immunities of the International criminal Court was adopted during the meeting of the Assembly of the States Parties, held from 3 to 10 September 2002, at United Nations Headquarters in New York; see [https://www.icc-cpi.int/nr/rdonlyres/23f24fdc-e9c2-4c43-be19-a19f5dde8882/140090/agreement\\_on\\_priv\\_and\\_imm\\_120704en.pdf](https://www.icc-cpi.int/nr/rdonlyres/23f24fdc-e9c2-4c43-be19-a19f5dde8882/140090/agreement_on_priv_and_imm_120704en.pdf). As at 26 May 2021, it has 78 States Parties; see [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-13&chapter=18&clang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-13&chapter=18&clang=en), last consulted on 20 October 2021.

<sup>22</sup> Prosecution, “Prosecution request for a finding on the non-cooperation of the Government of the Sudan in the case of *The Prosecutor v Ahmad Harun and Ali Kushayb*, pursuant to Article 87 of the Rome Statute”, 19 April 2010, ICC-02/05-01/20-55-Red.

observed a fundamental change to the position of the Sudanese Government with regard to its cooperation with the Court.

20. The government led by Omar al-Bashir was deposed by a coup d'état in April 2019. More importantly, on 3 October 2020, the Sudanese Government and Sudanese rebel groups signed the Juba Peace Agreement, which provides that “[t]he Parties acknowledge their preparedness for full and unlimited cooperation with the ICC concerning persons for whom arrest warrants have been issued.”<sup>23</sup> It further states that “[t]he Parties shall provide ICC prosecutors and investigators with easy access to victims, witnesses, and investigation sites, and shall allow ICC personnel to freely travel throughout Sudan’s roads, waterways, and airspace at all times”.<sup>24</sup> It also declares that “[t]he Parties shall not interfere with the investigations and trials conducted by the ICC and shall ensure the protection and safety of all prosecutors, victims, and witnesses”.<sup>25</sup>

21. The commitment of the Sudanese Government to fully cooperate with the ICC has been further demonstrated by the two “Memoranda of Understanding on cooperation between the Government of the Republic of Sudan and the Office of the Prosecutor of the International Criminal Court” signed, respectively, on 14 February 2021 and 12 August 2021,<sup>26</sup> and the conclusion of the Court wide Cooperation Agreement on 10 May 2021.

---

<sup>23</sup> Art. 24 (1), Chapter 3, Title 2 of the Juba Peace Agreement, 3 October 2020, <https://constitutionnet.org/vl/item/sudan-peace-agreement>, last accessed on 20 October 2021.

<sup>24</sup> Art. 24 (2), Chapter 3, Title 2 of the Juba Peace Agreement, 3 October 2020, <https://constitutionnet.org/vl/item/sudan-peace-agreement>, last accessed on 20 October 2021.

<sup>25</sup> Art. 24 (3), Chapter 3, Title 2 of the Juba Peace Agreement, 3 October 2020, <https://constitutionnet.org/vl/item/sudan-peace-agreement>, last accessed on 20 October 2021.

<sup>26</sup> The first Memorandum of Understanding (MoU) signed between the Sudanese Government and the Prosecution on 14 February 2021 has been superseded by the Cooperation Agreement of 10 May 2021.

22. The Registry further refers to (i) the unanimous decision<sup>27</sup> taken by the Sudan's Cabinet on 26 June 2021 to hand over the former officials indicted for war crimes in Darfur to the ICC and to (ii) the bill<sup>28</sup> to join the Rome Statute passed unanimously by the Cabinet on 3 August 2021. On 10 August 2021, the Sudanese Foreign Minister Mariam Al-Sadiq Al-Mahdi additionally confirmed that the extradition of "those wanted by the ICC" and the bill to join the Rome Statute would be presented in a joint meeting of the Sovereign Council and the Council of Ministers for ratification.<sup>29</sup> As of the time of reporting, there is no sign that a joint meeting of the Sovereign Council and the Council of Ministers took place for the ICC related matters. The Registry is closely monitoring any development in this regard.

23. With regards to the actual cooperation requested by the Court to the Sudanese authorities, the Registry confirms that, since the transfer of Mr Ali Muhammad Ali Abd-Al-Rahman to the seat of the Court, it has received very good cooperation from the authorities. As indicated in the Registry's previous report,<sup>30</sup> the Sudanese authorities have provided their cooperation on the basis of *ad hoc* cooperation requests, including prior to the conclusion of the Cooperation Agreement. Furthermore, on 11 October 2021, the Sudanese authorities have communicated an official letter to the Registry clarifying that cooperation with the ICC is not criminalised by law in Sudan. Detailed information regarding the communications between the Registry and the

---

<sup>27</sup> Sudan Cabinet: 'Unanimous decision' to hand Darfur war crimes accused to ICC, 27 June 2021, <https://www.dabangasudan.org/en/all-news/article/sudan-cabinet-unanimous-decision-to-hand-darfur-war-crimes-accused-to-icc>, last accessed on 20 October 2021.

<sup>28</sup> Sudanese cabinet votes to back International Criminal Court, 03 August 2021, <https://www.france24.com/en/live-news/20210803-sudanese-cabinet-votes-to-back-international-criminal-court>, last accessed on 20 October 2021.

<sup>29</sup> FM affirms Sudan's cooperation with International Criminal, 10 August 2021, <https://suna-news.net/read?id=719708>, last accessed on 20 October 2021.

<sup>30</sup> Registry, "Registry's observations on the "Requête en vertu des Articles 4-2 et 68-1 du Statut" (ICC-02/05-01/20-231-Red)", 15 January 2021, ICC-02/05-01/20-258-Conf.

Sudanese authorities surrounding this letter is provided in Annex I to the present report.<sup>31</sup>

24. The Registry notes that the Sudanese authorities have been responsive to the various types of cooperation requests communicated by the Registry although some of the cooperation requests have been complex and new to the authorities. It thus may happen that the authorities require more time to consider such requests. The Registry has also observed that the authorities have endeavoured to expedite their internal procedure to accommodate the Court's urgent requests. This has been in particular observed during the regular and fruitful interactions between the Registry and the focal point designated by the Sudanese Government for the Court on numerous enquiries and requests from the Registry and on the preparation of missions from the Court.

25. In the past couple of months, the number of requests sent by the Registry to the Sudanese authorities has significantly increased. As a result, the time for implementation of requests or replies may, at times, be longer. The Registry continues its efforts to follow up with the Sudanese authorities on their response to all cooperation requests in a timely manner. For the Chamber's full information, the Registry provides further details in Annex II regarding the transmission of the Defence requests to the Sudanese authorities.<sup>32</sup>

### C. Security assessment

26. In September 2021, the Court's security experts conducted a security assessment mission to Darfur, Sudan. Based on the outcome of this mission, it is recommended that approved essential missions could be conducted to a number of locations in Darfur, Sudan.

---

<sup>31</sup> Annex I to the present report.

<sup>32</sup> Annex II to the present report.

27. The political and security situation remains precarious in Sudan. Therefore, the Court's security experts continue to closely monitor the security situation in Sudan and will modify their recommendations as soon as they identify any deterioration of the situation. The Registry will also put in place all applicable security measures for the Court's missions.
28. The security assessment report produced by the Court's security experts is for internal use only. Therefore, the Registry has summarised the security assessment report in Annex III to the present report together with additional information regarding the current political situation in Sudan.<sup>33</sup>
29. The Registry also reaffirms its readiness to provide support to the missions requested by the parties and participants to a number of locations in Sudan, where the Registry has successfully secured the required support from the relevant UN agencies and/or international organisations.

#### D. Protection of Witnesses and Victims

30. The Victim and Witnesses Unit ("VWU") confirms that it can operate and conduct protection operations in some locations in Sudan. In that respect, the conclusion of the Cooperation Agreement has enhanced the existing capability of the VWU to perform its protection mandate in relation to witnesses and victims. The VWU is available to receive protection referrals from the parties and participants and to conduct the necessary assessments based on which protection measures might be decided upon and implemented.

---

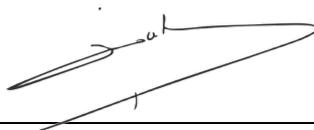
<sup>33</sup> Annex III to the present report.

31. The above-mentioned information was provided to the Defence team during a meeting on 6 October 2021.<sup>34</sup>

## VI. Conclusion

32. The Registry hereby confirms the applicable legal framework to facilitate the Court's activities in Sudan, the fruitful cooperation the Registry has received from Sudan to date and the recommendations made by the Court's security experts for the essential missions to be conducted in Sudan as well as its readiness to support the missions requested by the parties and participants.

33. Lastly, the Registry reports to the Chamber that, in accordance with the Chamber's instruction delivered during the status conference of 8 September 2021, it has conducted *inter partes* communication between the Defence and the Registry on the issues regarding cooperation with Sudan as well as the security assessment conducted by the Court's security experts and provided all relevant information requested by the Defence. The Registry remains at the Chamber's disposal to provide any further information that may be required.



---

Marc Dubuisson, Director, Division of Judicial Services  
on behalf of  
Peter Lewis, Registrar

Dated this 22 October 2021

At The Hague, the Netherlands

---

<sup>34</sup> Defence, Annex E to the "Observations de la Défense en relation avec la sécurité des témoins, des victimes et des autres personnes à risque du fait des activités de la Cour, y compris son personnel, au Soudan", 8 October 2021, CC-02/05-01/20-481-Conf-AnxE.