

**THIRTY-FIRST REPORT OF THE PROSECUTOR OF THE INTERNATIONAL
CRIMINAL COURT TO THE UNITED NATIONS SECURITY COUNCIL PURSUANT
TO UNSCR 1593 (2005)**

1. INTRODUCTION

1. On 31 March 2005, the United Nations Security Council (“UNSC” or “Council”) adopted Resolution 1593 (“UNSCR 1593”), referring the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court (“ICC” or “Court”). The Council invited the Prosecutor to address it every six months on actions taken pursuant to UNSCR 1593.
2. This is the thirty-first report to the Council on the activities of the Office of the Prosecutor (“OTP” or “Office”).

2. RECENT DEVELOPMENTS IN SUDAN

3. Despite the global disruption caused by the ongoing COVID-19 pandemic, the Republic of the Sudan (“Sudan”) continues to make progress in ongoing discussions regarding justice for the victims of the Darfur conflict. In particular, accountability for crimes in Darfur remains a central issue in the peace negotiations between the Government of Sudan and rebel groups in Juba, South Sudan.
4. On 11 February 2020, spokesman for the Government of Sudan, Muhammad Hassan Al-Ta’ishi, reportedly announced that an agreement had been reached with rebel groups that justice in Darfur required the *“appearance of those against whom arrest warrants were issued by the ICC.”* Al-Ta’ishi also announced an agreement to create a Darfur special court. Following this announcement, similar statements in relation to the appearance of the Darfur suspects before the ICC were purportedly made by

other members of the Sovereign Council. The Office is encouraged by these public statements by Sudanese officials indicating a commitment to cooperate with the Court. They represent an important step on the road to accountability in the Darfur situation.

5. Reportedly, the peace negotiations in Juba have continued, with some discussions taking place via video-conferencing. The Office remains hopeful that all parties to this process remain committed to justice for the victims in the Darfur situation, which will be crucial to securing an enduring peace.
6. Sudan's overall security situation has been precarious during the reporting period. The Office was deeply troubled by the apparent assassination attempt against Prime Minister Abdalla Hamdok on 9 March 2020. The Office condemns all attempts to impede Sudan's transition process.

Status of Suspects

7. On 8 April 2020, the Sudanese High Court of Appeal affirmed the conviction of Mr Omar Hassan Ahmad Al Bashir ("Mr Al Bashir") in December 2019 for charges related to financial corruption. Mr Al Bashir was reportedly ordered to serve his two year sentence at a correctional facility, and some of his assets were confiscated. In March 2020, the Public Prosecutor announced new charges against Mr Al Bashir related to the 1989 coup, including a charge of undermining the constitutional order.
8. The Office notes reports that Mr Ahmad Muhammad Harun contracted the COVID-19 virus while awaiting charges in Kober prison and was transferred to a hospital for treatment.
9. The Office is not aware of any further developments regarding Mr Abdel Raheem Muhammad Hussein, who is reportedly being held in the custody of the Government of the Sudan awaiting charges by the Public Prosecutor.

10. Messrs Ali Muhammad Ali Abd-Al-Rahman (also known as Ali Kushayb) and Abdallah Banda Abakaer Nourain (“Mr Banda”) remain fugitives from the Court.
11. The Office is aware of media reports that Sudanese authorities have raised the possibility of proceedings against the ICC suspects in Sudan, including an ICC trial or a hybrid court in Khartoum. In this regard, the Office notes that in referring the Darfur situation to the Court pursuant to UNSCR 1593 (2005), the Council expressly contemplated “*the possibility of conducting proceedings in the region, which would contribute to regional efforts in the fight against impunity.*”
12. Subject to its mandate as set out in the Rome Statute (the “Statute”), the Office welcomes active dialogue with the Government of Sudan to explore all options available to facilitate fair and genuine proceedings against the Darfur suspects.
13. Nevertheless, with due regard for the core principle of complementarity, the ICC warrants of arrest for the five suspects in the Darfur situation remain in force. Notwithstanding other domestic charges that have been brought against the suspects, Sudan remains under an obligation to surrender them to the Court for trial pursuant to UNSCR 1593 (2005) and subsequent orders of the ICC judges.

3. RECENT JUDICIAL ACTIVITIES

14. On 13 December 2019, further to the order of Trial Chamber IV (the “Chamber”) on 13 November 2019, the Office filed its submissions on trials *in absentia* in the specific circumstances of the case against Mr Banda in *The Prosecutor v. Abdallah Banda Abakaer Nourain*. The Office filed a public redacted version of this filing on 11 May 2020.
15. As set out in more detail in those submissions, the Office took the position that trials *in absentia* are not permitted by the Statute, which requires that “[t]he accused shall be present during the trial” pursuant to article 63(1). The Office argued that this article precludes the possibility of a trial *in absentia* at the ICC and that the Appeals Chamber

had affirmed this. The Office also argued that this position is confirmed by a contextual reading of the Statute and the drafting history of article 63(1). Furthermore, the Office asserted that the object and purpose of the Statute requires an accused's presence at trial.

16. The Office also contended that the exceptions under article 63(2) and rules 134*bis*, 134*ter* and 134*quater* of the Rules of Procedure and Evidence, which provide that trials at the ICC may proceed in the temporary absence of an accused, do not apply to Mr Banda. In particular, the exceptions under such rules only apply when an accused is under a summons, rather than an accused subject to an arrest warrant like Mr Banda. The Office argued that a trial *in absentia* would frustrate the fundamental purpose behind the Chamber's previous decision to replace his summons with an arrest warrant. Finally, the Office pointed to significant practical obstacles in the specific circumstances of Mr Banda's case that strongly militate against a trial *in absentia*.
17. On 11 May 2020, the Office filed a response to a request on 28 April by the Legal Representatives of Victims ("LRV") for leave to submit observations on a trial *in absentia* and a request for access to confidential materials in the case against Mr Banda. The Office did not object to the request for leave to submit observations from the LRV. The Office took the position that a trial *in absentia* would directly affect the personal interests of the victims and, therefore, the participation of the LRV would be consistent with article 68(3) of the Statute. Regarding the request for access to confidential materials, the Office deferred to the Chamber's determination of the issue.
18. On 13 May 2020, the Chamber issued its decision directing, by majority, the LRV to file observations on trials *in absentia* in the specific circumstances of the case and instructing the Registry to reclassify a transcript relevant to its request.

4. ONGOING INVESTIGATIONS AND ENQUIRIES INTO ALLEGATIONS OF CURRENT CRIMES

19. Despite the restrictions caused by the current pandemic, and ongoing budgetary constraints, the Darfur team has further advanced its investigations, and it has continued to strengthen its cases.
20. During the current reporting period, the number of reported civilian casualties in Darfur was approximately 80. The majority of these civilian casualties allegedly related to localised incidents involving tribal clashes, disputes over land access, and violence against internally displaced persons (“IDPs”).
21. The largest incidents took place in and around El Geneina, West Darfur, between 29 and 31 December 2019. According to the 12 March 2020 report of the Chairperson of the African Union (“AU”) Commission and the Secretary-General of the United Nations (“UN”) in relation to the AU – UN Hybrid Operation in Darfur (“UNAMID”), a dispute between an Arab individual and an IDP escalated into an attack by Arab tribesmen and the Rapid Support Forces against the Krinding IDP camp on 29 December. On 30 and 31 December 2019, several villages near El Geneina were also attacked. These incidents allegedly resulted in the killing of 65 people, destruction of shelters and burning of villages, and looting of El Geneina hospital. However, it is unclear whether the people killed were armed tribesmen participating in clashes or civilians. After this attack, approximately 46,000 people sought refuge elsewhere inside Sudan and an additional 11,000 people fled to Chad.
22. Incidents of sexual and gender-based violence against women remain a serious concern. On 14 January 2020, the UN Panel of Experts on the Sudan stated that “[a]cts of rape and other forms of sexual and physical violence were a common occurrence and were often used as tactics to prevent communities from gaining access to their farms and from engaging in other livelihood activities.” The Office notes that at least nine incidents of rape were reported among 14 female victims during the reporting period. Most of

these women were reportedly gang-raped while carrying out activities related to their livelihood, such as farming or collecting firewood.

23. The Office strongly condemns any type of attack against humanitarian aid workers in Darfur, including the alleged harassment of International Organisation for Migration (“IOM”) staff members and the looting of humanitarian supplies from five local NGOs in Kabkabiya, North Darfur, on or around 22 January 2020.
24. Finally, the Office observes the general trend identified by the IOM Displacement Tracking Matrix that the number of returnees has exceeded the number of IDPs in Darfur throughout 2019. While welcoming this positive trend, the Office cautions that many IDPs returning to their areas of origin, including women, may continue to face abuses and human rights violence due to rising tensions over land occupation issues.

5. COOPERATION

25. During the reporting period, the Office has continued its efforts to engage in a constructive dialogue with the Government of Sudan. Cognisant of our respective roles and mandates, the Office has continued to pursue a new relationship with Sudan. The Office urges Sudan’s transitional authorities to meet its obligations under UNSCR 1593 (2005) by fully cooperating with the Court.
26. The Council’s referral of the Darfur situation pursuant to UNSCR 1593 is unambiguous in its requirement that Sudan cooperate with the Office. Acting under Chapter VII of the UN Charter, the Council stated that the *“Government of Sudan and all other parties to the conflict in Darfur, shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor.”* The timely and effective cooperation of Sudan is crucial for the Office to conduct independent and impartial investigations and prosecutions of alleged crimes in Darfur.

27. For the avoidance of doubt, the Office clarifies that it has not been able to access the territory of Sudan to conduct any investigations in the Darfur situation since 2007. While the ongoing transition is undeniably complex, it is imperative for the Office's investigation that Sudan's authorities demonstrably turn the page on the previous administration's posture toward the Court. As the State where the crimes are alleged to have occurred, Sudan has the sole capacity to grant the Office access to crime scenes, victims and witnesses, as well as documentary, judicial and forensic evidence. The resumption of this access is essential for the Office's ongoing investigations in relation to its current cases.

28. The Office also relies on the principled cooperation of other States for these investigations. The Office is grateful to those States that have provided necessary support to the Office's investigations into crimes committed in Darfur.

29. The Office recalls UNSCR 2495 (2019) and UNSCR 2517 (2020) regarding UNAMID's mandate. The Office remains concerned about the protection of civilians and the impact of the COVID-19 pandemic on humanitarian assistance. In this context, the Office anticipates that UNAMID's carefully calibrated drawdown will take account of the persistent security challenges faced by vulnerable populations in Darfur.

30. The Office will continue to encourage Sudan's transitional authorities to join the Court in ensuring that justice is delivered for the victims of crimes committed in Darfur. In doing so, it will look to the Council to ensure full cooperation by all relevant parties for its investigation.

6. CONCLUSION

31. Sudan has faced tremendous change in the past year. The Office has extended open arms to the Sudanese authorities to work together to ensure that the perpetrators of the atrocities in Darfur are brought to justice before a competent tribunal. The Office hopes that Sudan will embrace this historic opportunity in both word and action.

32. The Office was heartened by the recent statements by Sudanese officials regarding full cooperation with the Court, and the related remarks of Mr Omer Mohamed Ahmed Siddig, Representative of Sudan, in response to the Office's report to the Council on 18 December 2019:

"In this new reality, there is no place for impunity. Accountability is its cornerstone, prosecution and legal recourse rulings are protected and enforced, and its boundaries are freedoms that respect human rights. It will be a reality where children are taken care of and protected, women are empowered and dealt with on equal footing, young people are heard, and old people and people with disabilities are attended to and provided for. [...] Under this new reality, priority will be given to persons affected by war and conflict, whether martyred, killed, injured, disappeared, displaced or refugees."

33. The Office exhorts the Sudanese authorities to demonstrate their commitment to a new reality in Sudan, in which impunity has no place and victims are empowered, by surrendering the suspects in the Darfur situation to the Court without delay. Having opened the necessary channels of communication, it stands ready and able to provide complete support. | OTP