

## The ICC and Sudan : Questions & Answers

Paris, Kampala, 31 March 2015 - On the 10th anniversary of the UN Security Council referral of the situation in Darfur, Sudan, to the International Criminal Court (ICC), and six years after the issuance of an international arrest warrant for President Omar Al-Bashir, FIDH and ACJPS issue this Q&A to clarify and address certain issues.

*« Faced with no will and no capacity of the Sudanese justice system to genuinely investigate and prosecute international crimes committed in Darfur and the rest of country, the UN Security Council must support the ICC to enable victims to obtain justice »*, said Amir Suleiman, ACJPS Legal Programme Coordinator.

*« Impunity for international crimes in Sudan has only encouraged the continuation of the commission of serious human rights violations. This must stop. The UN Security Council and the international community have to actively cooperate with the ICC and help arrest and surrender the suspects »*, said Karim Lahidji, FIDH President.

### 1. It has been 10 years since the UN Security Council referred the situation in Darfur-Sudan to the ICC. What has been done since then?

On 31 March 2005, the UN Security Council adopted [Resolution 1593](#) under Chapter VII of the UN Charter (relating to threats to international peace and security) and under Article 13 of the ICC Statute, referring the situation in Darfur-Sudan to the ICC. In its Resolution, the Security Council invoked, in particular, the conclusions of an international commission of inquiry which, upon verifying the gravity of the crimes committed in Darfur, recommended that the situation be referred to the Court.

After opening and completing a preliminary examination, the ICC Prosecutor announced on 6 June 2005 the [opening of an investigation](#) into the situation in Darfur-Sudan.

Since then, the ICC Office of the Prosecutor (OTP) has been undertaking investigative and prosecutorial activities. This resulted in the ICC judges issuing four arrest warrants against three high-level officials of the government of Sudan, and against one commander of the Justice and Equality Movement (JEM). Confirmation of charges hearings took place for two suspects, charges were dropped for one of them, and confirmed for the other, who should be sent to trial.

Every six months, the ICC Prosecutor presents a [report to the UN Security Council](#) on the state of the investigation and prosecution activities in relation to the situation.

### 2. Who are the suspects targeted by the ICC so far?

On 27 April 2007, the ICC issued two arrest warrants against **Ahmad Harun**, former Minister for the Interior, Minister for Humanitarian Affairs and current governor of North Kordofan, and **Ali Kushayb**, alleged Janjaweed militia leader. Both men are charged with crimes against humanity and war crimes committed between August 2003 and March 2004 in Darfur. They remain at large.

On 4 March 2009, the ICC issued an arrest warrant against sitting President **Omar Al Bashir**, for crimes against humanity and war crimes. A second arrest warrant was issued on 12 July 2010 against him adding charges of genocide. ICC judges thereby decided that there are « reasonable grounds to believe » that Al-Bashir is responsible for the crimes against humanity and war crimes of murder, extermination, forcible transfer of population, torture, rape, intentionally directing attacks against the civilian population and pillaging, as well as for crimes of genocide, intentionally destroying in whole or in part ethnic groups as such by killing, causing serious bodily or mental harm and inflicting conditions of life calculated to bring about the group's physical destruction.

On 1 March 2012, the ICC issued an arrest warrant against **Abdel Raheem Mohammad Hussein**, current Minister of National Defence and former Minister of the Interior, as well as former Sudanese President's Special Representative in Darfur for crimes against humanity and war crimes. He remains at large.

The ICC also issued summons to appear against three suspects for war crimes linked to the United Resistance Front: Abu Garda, Abdallah Banda and Mohammed Jerbo. After confirmation of charges hearings held in October 2009, the charges against Abu Garda were not confirmed. Proceedings against Mohammed Jerbo were terminated after evidence pointing towards his death were received. After a confirmation of charges hearing in December 2010, in presence of the accused, charges against **Abdallah Banda**, commander-in-chief of the Justice and Equality Movement (JEM) Collective-Leadership, component of the United Resistance Front, were confirmed on 7 March 2011. He is accused of three counts of war crimes committed in an attack against the African Union Peacekeeping Mission at the Haskanita Military Group Site in Darfur-Sudan, that took place on the evening of 29 September 2007. In order to ensure the accused's presence at trial, which date has not yet been set, an arrest warrant for war crimes was then issued on 11 September 2014.

### **3. Why is the process taking so long ? What is delaying judicial proceedings ?**

In order for investigations and prosecutions for international crimes to be genuine, thorough, and accurate, an adequate time is needed, especially when the crimes being investigated have been or are being committed in conflict areas. However, the ICC also needs cooperation from national authorities and international and national organisations.

Faced with the lack of cooperation of Sudan and of States Parties to the ICC Statute, including Chad, Kenya and DRC, that received Al Bashir on several occasions without implementing the pending arrest warrants against him, as well as the lack of active commitment of the UN Security Council to follow-up on its referral of the situation to the ICC, it has proven more and more difficult for the OTP to undertake its work. Because of this lack of cooperation and the lack of active commitment of the international community, three of the main suspects, who still hold high positions within the government of Sudan, remain at large, in spite of outstanding arrest warrants against them. This situation unfortunately delays judicial proceedings.

### **4. In her last report to the UN Security Council in December 2014, the ICC Prosecutor said her Office « hibernated » its investigations into the situation in Darfur-Sudan. What does this mean ?**

On 12 December 2014, Fatou Bensouda presented the 20th report of her Office to the UN Security Council on the state of investigations and prosecutions in the Darfur situation. On this occasion, she [stated](#):

*« Faced with an environment where my Office's limited resources for investigations are already overstretched, and given this [UN Security] Council's lack of foresight on what should happen in Darfur, I am left with no choice but to hibernate investigative activities in Darfur as I shift resources to other urgent cases, especially those in which trial is approaching. »*

The situation in Darfur and in the Sudan has not improved and even worsened as impunity prevails. Ahmad Harun, who has been wanted since 2007 for war crimes and crimes against humanity in Darfur, led repression in South Kordofan, where he was governor. As Fatou Besouda said : *« We find ourselves in a stalemate that can only embolden perpetrators to continue their brutality. »*

She explained that unless there is a change of approach and strong political support for innovative solutions relating to Darfur by the UN Security Council and the international community, her Office will have little or nothing to report to the Council as progress on the cases will be impossible. This stalemate reached by the OTP alongside the Office's limited resources explains the Prosecutor's decision to hibernate investigations.

« Hibernation », however, does not mean that the Prosecutor has dropped charges or closed the cases against the targeted suspects. The five outstanding arrest warrants, including against Omar Al Bashir, are still valid and the international community should cooperate with the ICC to execute them as soon as possible, so that victims of these international crimes can finally obtain justice.

### **5. What is the role of the UN Security Council ? What are the obligations of States Parties to the ICC Statute and Non States Parties ?**

States and international organisations are required to respect the Court's independence. Moreover, the States Parties to the ICC Statute must cooperate with the Court (Chapter IX of the Statute). This cooperation not only implies concrete actions such as arresting and transferring suspects to the Court, supporting access to information, protecting witnesses, freezing and seizing assets, etc. It also requires political support to the

Court in bilateral state relations, as well as in their actions within international and regional organisations.

It is up to States Parties to the ICC Statute to execute the arrest warrants issued by the Court. In the case of the Darfur situation, all United Nations Member States, including Sudan, must cooperate with the ICC so that it can carry out its investigations and prosecutions (including through the arrest and surrender of persons sought by the Court), as the Security Council decided to refer the situation to the ICC through a resolution under Chapter VII of the United Nations Charter.

Several non-cooperation proceedings have been initiated and the ICC rendered two decisions on non-cooperation in the [Harun & Kushayb case in May 2010](#) and in the [Al Bashir case in March 2015](#). In these decisions, the Pre-Trial Chamber found that the Republic of Sudan had failed to cooperate with the Court with respect to its requests for the arrest and surrender of these suspects, and recalled that the Security Council « *is vested with the power to address and take any action in respect of Sudan's failure to cooperate with the Court* ».

However, the UN Security Council has not used this power. As Fatou Bensouda said in her December 2014 statement to the UN Security Council:

*« In the almost ten years that my Office has been reporting to this Council, there has never been a strategic recommendation provided to my Office, neither have there been any discussions resulting in concrete solutions for the problems we face in the Darfur situation. (...) What is needed is a dramatic shift in the Council's approach to arresting Darfur suspects. »*

## **6. The Sudanese authorities established a Special Court on the Events in Darfur in 2005. What is the state of proceedings?**

Although Sudan established the Special Criminal Court on the Events in Darfur (the Special Court) in 2005 to try those responsible for the events in Darfur, the Prosecutor's investigations and many international reports (especially those of the UN and of international NGOs) have revealed that this court has only addressed a few cases without relation to the serious crimes committed in Darfur over the past ten years. This Special Court has faced many obstacles, including a lack of independence, which shows once again the Sudanese authorities' lack of political will to successfully complete investigations and prosecutions for international crimes.

Two cases targeting rebels are ongoing before the Special Court. In a decision rendered on 30 March 2015, the Special Court sentenced one individual from the Justice and Equality Movement (JEM) to death for a number of crimes including article 50 (undermining the constitution) and 51 (waging war against the state) of the 1991 Sudanese Penal Code. Another case involving 19 rebels from the Sudan Liberation Army – Minni Minnawi faction facing the same charges is still pending.

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