

# Q&A: The International Criminal Court (ICC) in Sudan

## Understanding the ICC's Role in Securing Justice for Crimes in Darfur

In a historic milestone, the first trial at the International Criminal Court (ICC) concerning crimes committed in Darfur will open on 5 April 2022 against former Janjaweed commander Ali Muhammad Ali Abd-Al-Rahman (“Ali Kushayb”). Ali Kushayb voluntarily surrendered himself to ICC custody in the Central African Republic in June 2020, more than a decade after the ICC issued an arrest warrant on 27 April 2007. Ali Kushayb has been charged with 31 counts of war crimes and crimes against humanity allegedly committed in Darfur, Sudan.

The case against Ali Kushayb is the first prosecution to move forward in either an international or Sudanese court against high-level perpetrators of atrocities in Darfur. Four other arrest warrants remain outstanding at the ICC, including against former president Omar al-Bashir; Ahmed Muhammad Harun (former Minister of State for the Interior and governor of South and North Kordofan); Abdel Raheem Muhammad Hussein (former Minister of National Defence and Minister of the Interior); and Abdallah Banda Abakaer Nourain (former commander-in-chief of the Justice and Equality Movement Collective-Leadership). Three of these individuals – al-Bashir, Ahmed Harun, and Abdel Raheem Muhammed Hussein – are currently in Sudan’s custody.

While there are often barriers to accountability, the case against Ali Kushayb demonstrates that securing justice is a long-term objective, and that accountability can come even after many years. More needs to be done to ensure that there is no impunity for serious human rights violations and international crimes committed in Darfur (and across Sudan), but the Ali Kushayb case at the ICC is an important first step.

This Q&A addresses key questions regarding [the International Criminal Court \(ICC\)](#), its relationship with Sudan, the Court’s ongoing work in Sudan, victims’ rights at the ICC, and the Ali Kushayb case.

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# General Questions: The ICC

## 1. What is the International Criminal Court (ICC)?

The ICC is an independent international judicial institution mandated to investigate and prosecute war crimes, crimes against humanity, genocide, and the crime of aggression, often referred to as “core international crimes.” The ICC was created by a treaty (an agreement signed between countries) called the Rome Statute.

Currently, 123 countries are members of the ICC, which gives the ICC the authority to investigate and prosecute crimes committed in their territory or by their nationals.

The ICC has been in operation since 1 July 2002. The ICC has handled 30 cases. Judges have issued 10 convictions and 4 acquittals.

## 2. What does the principle of “complementarity” mean?

The principle of complementarity means that the ICC can only act in a situation if the relevant states cannot or do not want to genuinely prosecute core international crimes within their jurisdiction. The principle of complementarity encourages states to carry out their primary responsibility for investigating and prosecuting serious international crimes, while also preventing impunity where states cannot meet this obligation. The principle of complementarity also protects accused persons from being prosecuted before the ICC for a second time if they have already been prosecuted by a national court for the same crimes.

## 3. Can a case be transferred to a national court before a trial begins at the ICC?

Yes, if there are genuine prosecutions for the same suspect and the same alleged criminal conducts. Both the Defence and the state concerned may raise a challenge to the admissibility of a case before ICC judges who would then decide on the matter. These admissibility challenges can be made at several different points, including after the issuance of an arrest warrant, during the confirmation of charges hearing, and before the opening of a trial.

National proceedings for different alleged conducts are not sufficient to apply the principle of complementarity and thus the case would then continue before the ICC.

#### **4. Can a national court request the transfer of suspects in ICC custody for prosecution in domestic proceedings after a case is deemed admissible at the ICC?**

No, once the ICC has determined that national authorities are not able or willing to investigate a case, and otherwise determines that a case is admissible, the Rome Statute does not provide a mechanism for transferring suspects back to a State for domestic proceedings. Only in exceptional circumstances can a case be challenged after the beginning of a trial with the permission of the Court, because the admissibility of a case will have been checked by the ICC at several different times before the beginning of a trial.

#### **5. What does it mean to “cooperate” with the ICC?**

In UN Resolution 1593, the UN Security Council stated 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 Court.” Because of this, Sudan is obligated to cooperate with the ICC. This means that Sudan’s authorities must permit the ICC full access to Darfur, to victims, and to relevant witnesses and records as requested by the Court, though ICC judges may waive the obligation to cooperate in certain circumstances.

Parties to the Rome Statute (the treaty establishing the ICC) are also obligated to cooperate with the ICC, including through compliance with extradition requests and providing judicial assistance (e.g. assisting with gathering evidence and permitting investigators to access critical places and sites).

States that did not sign the Rome Statute are generally not obligated to cooperate with the ICC, though they are encouraged to do so. In UN Resolution 1593, for example, the UN Security Council urged “all States and concerned regional and other international organizations to cooperate fully” with its investigation into crimes committed in Darfur.

#### **6. Why do ICC proceedings include a “preliminary examination” phase?**

The ICC Prosecutor conducts preliminary examinations in order to determine whether an ICC investigation is needed. Preliminary examinations can be initiated on the basis of: (1) information sent to the Court by non-governmental organisations, individuals, or other groups; (2) a referral by the UN Security Council or a State party; or (3) after a declaration by a State that is not a member of the Court, accepting the jurisdiction of the Court.

Preliminary examinations are divided into four consecutive stages, through which the ICC Prosecutor gathers and organises relevant information and evaluates whether the Court

has jurisdiction (the legal authority to make a decision) over the situation. The Prosecutor will assess whether the case is admissible based on the gravity (seriousness) of the crimes committed, and whether the State concerned was already prosecuting the same crimes. Lastly, the Prosecutor will also determine whether opening an investigation would be in the interests of justice (e.g, providing accountability for serious crimes committed).

If the preliminary examination was launched by the ICC Prosecutor after the referral by a non State Party or on the basis of information submitted by NGOs, individuals or other groups, a Pre-Trial Chamber at the ICC would have to authorise the opening of a formal investigation. In all other cases, once the jurisdiction and admissibility requirements have been satisfied, the ICC Prosecutor may begin an investigation without authorisation from ICC judges.

# Sudan and the ICC

## 7. What is the relationship between Sudan's authorities and the ICC?

Sudan is not a party to the Rome Statute. However, Sudan's authorities are obligated to cooperate with the ICC according to the UN Security Council Resolution 1593 (2005). This resolution requested the ICC to investigate alleged crimes against humanity, war crimes, and genocide committed since 2002 by Sudanese officials, the Janjaweed, and rebel forces.

Under former president Omar al-Bashir, who was indicted by the ICC and is still subject to two arrest warrants, Sudan's government did not cooperate with the ICC. Today, the transitional government has signed a memorandum of understanding (MoU) with the ICC related to the Ali Kushayb case. The contents of the MoU remain confidential, but the government has affirmed its willingness to support the ICC Prosecutor in conducting any necessary investigations. Now that Ali Kushayb's case has been confirmed, with a trial date set for 5 April 2022, ICC investigators will need Sudanese authorities' support with the transfer of witnesses, the provision of protective measures, or other additional matters.

In addition to these steps, the transitional government is also obligated to surrender ICC fugitives who are currently in Sudanese custody. This includes Omar al-Bashir, Ahmed Haroun (former state minister for humanitarian affairs and governor of South Kordofan), Abdulraheem Mohamed Hussein (former defence minister), and Abdallah Banda Abakaer, a commander within the rebel Justice and Equality Movement (JEM). The ICC does not try individuals in their absence. There is no legal basis for the Sudanese government to refuse to transfer these individuals, unless Sudanese authorities successfully challenge this obligation before judges at the ICC.

## 8. If the transitional government doesn't cooperate with the ICC, what can the UN Security Council do to compel the transfer of wanted suspects to The Hague?

One of the greatest challenges facing the ICC is securing the arrest and custody of wanted individuals. The ICC cannot act unilaterally to arrest individuals because it does not have its own police force or other enforcement authority. Furthermore, it requires the state's consent to enter its territory.

The Rome Statute provides that, where a country fails to cooperate with requests from the ICC, the UN Security Council may intervene. In theory, the UN Security Council may impose measures such as economic sanctions, freezing of assets, travel bans, or even military

intervention under its Chapter VII authority. However, to date, the UN has not used its enforcement powers with regards to the ICC.

## **9. Why was former president Omar al-Bashir able to travel freely, even after being indicted by the ICC? What can the Court do when States don't cooperate with the ICC?**

The existence of a duty upon states to arrest and surrender Omar al-Bashir, who at the time of his travels was the president of a non-state party to the Rome Statute, has been debated before ICC judges. While it is currently understood that States Parties (e.g., Chad, Nigeria, the Central African Republic, Malawi, the Democratic Republic of the Congo, South Africa, and the Kingdom of Jordan) were under an obligation to execute outstanding ICC's arrest warrants against him, all of them failed to comply with such duty.

In the event that countries do not comply with a request to cooperate by the Court, the Court may make a finding of non-cooperation and the matter may be referred to the Assembly of States Parties (the group of all ICC members) or the UN Security Council. Several non-cooperation cases have been raised in relation to former president Omar al-Bashir's travel: Malawi, the Democratic Republic of Congo, South Africa, and the Kingdom of Jordan all faced non-cooperation cases. Each of these states was determined to have failed to cooperate with the ICC. Despite this, the UN Security Council has not taken any enforcement measures in relation to non-cooperation cases.

On the other hand, States that have not signed the Rome Statute were not under an equally binding obligation to arrest and surrender Omar al-Bashir.

## **10. The United Nations Security Council referred only crimes committed in Darfur, while other crimes committed in Sudan have not been included. Are crimes committed in other areas of Sudan under investigation by the ICC?**

Crimes committed outside of Darfur are not currently under investigation by the ICC. On 31 March 2005, the UN Security Council adopted Resolution 1593 (2005), which referred the "situation in Darfur since 1 July 2002" to the ICC. In June 2005, the ICC Prosecutor determined that the requirements for initiating an investigation had been fulfilled, and opened an investigation. Despite evidence that similar crimes have been committed around other parts of Sudan, the Court can only investigate crimes committed in Darfur or those that are closely linked with the authorised investigation.

# The Ali Kushayb Case

## 11. Mr. Abd-al-Rahman (“Ali Kushayb”) has been charged with 31 counts of war crimes and crimes against humanity. How did the Court identify these crimes?

On 27 April 2007, the ICC issued an arrest warrant for Ali Kushayb, one of the leaders of the *Janjaweed* (who also held command positions in Sudan’s auxiliary Popular Defence Forces and Central Reserve Police). A first arrest warrant charged Kushayb with 50 counts of crimes against humanity and war crimes, on the basis of Ali Kushayb’s alleged responsibility for rapes, destruction of property, inhumane acts, and attacks and killing of civilians in four villages in West Darfur in 2003 and 2004. A second arrest warrant published on 11 June 2020, added an additional 3 charges of war crimes and crimes against humanity for murder and inhumane acts committed in the village of Deleig and surrounding areas of Darfur in March 2004.

At the confirmation of charges hearing beginning on 24 May 2021, ICC judges assessed whether there was enough evidence against Mr Kushayb for the case to go to trial. Based on the available evidence, the Judges confirmed 31 counts of war crimes and crimes against humanity. They cover incidents that took place in Deleig, Bindisi, Mukjar, and Kodoom between 2003 and 2004.

## 12. Why is the ICC only looking at crimes committed between August 2003 and March 2004?

The ICC Prosecutor charged Mr. Kushayb with crimes that occurred between August 2003 and around March 2004, when Mr. Kushayb was known to serve as a senior leader of the *Janjaweed* in the Wadi Salih and Mukjar Localities (West Darfur). However, the ICC is mandated under the UN Security Council resolution to investigate any crimes which occurred in Darfur across a longer time period.

Focusing on a limited number of events or a limited time period is a prosecutorial strategy often used in different jurisdictions, not just at the ICC. Given the lack of access that the ICC had to the Sudan since the referral from the UN Security Council, and because of the time that has passed since the commission of the crimes, it is reasonable to think that the ICC Prosecutor decided to focus on those charges that would be most likely to grant him a conviction. This appears to be the case in light of the recent confirmation of charges decision issued against Mr. Kushayb.



### **13. How has the coronavirus impacted the Court's ability to investigate this case, and will the pandemic impact the outcome of the case?**

The coronavirus pandemic has limited the Court's ability to travel to Sudan (and the rest of the world), and the Court has had to adapt to using online platforms to reach affected communities. Because not all communities in Darfur have internet access, there are limitations in using online platforms. However, the Court is working to use other methods of communication to reach communities in Darfur, including the radio and information sessions for local leaders.

Despite the pandemic, the Ali Kushayb trial continues to move forward; charges in the Kushayb case have been confirmed, and the trial date is scheduled for 5 April 2022. Investigators have travelled to Sudan to continue gathering evidence in this case.

### **14. How is Ahmed Haroun's case connected to ongoing proceedings against Ali Kushayb?**

ICC [arrest warrants](#) were issued for both Ali Kushayb and Ahmed Haroun on 27 April 2007. The ICC Prosecution stated that, from about April 2003 to September 2005, Ahmed Haroun served as Minister of State for the Interior of the Government of Sudan, and was responsible for coordinating the "Darfur security desk," including the various groups involved in the counter-insurgency: the police, Sudan Armed Forces (SAF), National Intelligence and Security Service (NISS), and the Janjaweed. The arrest warrants for both Ahmed Haroun and Ali Kushayb outlined their responsibility for crimes against humanity and war crimes allegedly committed in Darfur between August 2003 and March 2004.

However, once Ali Kushayb was transferred to ICC custody, it was decided to "sever," or separate, the Kushayb and Haroun cases, because the ICC determined that it was not "necessary or appropriate" to hold a hearing about Ahmed Haroun without his presence. To protect Ali Kushayb's right to a fair trial, his case has been severed from Ahmed Haroun's case.

# Victims' and Witnesses' Rights at the ICC

## 15. What is the difference between a victim and a witness?

A victim is a person who suffered harm as a result of a crime within the ICC's jurisdiction.

The ICC recognises the following categories of victims:

- **Individual persons** who have suffered harm as a result of one of the ICC crimes. A victim can also be a person who suffers harm as a result of a crime targeted at another person, such as a family member of someone who was killed. See question #17 for more information about applying to participate as a victim in the ongoing Ali Kushayb case.
- **Organisations or institutions**, when their property is dedicated to certain purposes (e.g. religion, education, art, science, charitable/humanitarian purposes, historic monuments or hospitals) and is harmed as a result of one of the crimes outlined in the ICC arrest warrants.

Victims seek redress and may intervene at various stages of the proceedings. This is generally done through a common legal representative: a lawyer who speaks on behalf of a group of victims. Victims are not generally expected to travel to the ICC, although this might happen if the judges so decide. The legal representative normally travels from where victims live to the ICC and presents their views and concerns in the courtroom.

On the other hand, a witness is a person who provides information before the Court about a crime or who committed it. Witnesses may be called during a trial by the ICC Prosecutor, the Defence, the Judges, or the victims' legal representative(s). Witnesses give evidence by testifying and answering related questions, and are asked to testify at a specific time by the ICC Prosecutor, Defence, Judges, or victims' legal representatives. Witnesses do not normally have a legal representative and usually testify in person in the courtroom.

Some witnesses are also victims participating in the proceedings, but this is not always the case. For example, witnesses could be experts who give information as a result of their particular knowledge without being victims themselves.

## 16. How can victims participate in proceedings at the ICC?

The ICC is unique in that victims may share their views and concerns directly to the Judges. This is called participation in proceedings and normally happens through a legal representative. Participation in judicial proceedings is voluntary and free. It is up to victims to decide what to say.

Victims who wish to participate can apply through a standard application form which will be considered by the Court and decided on by the Judges. Once a victim has been accepted by the Judges as entitled to participate during a particular stage of ICC proceedings, the Court must keep him/her informed about developments in the proceedings.

Participating in criminal proceedings, by its very nature, involves an element of risk. It is important to be aware that the ICC has very limited capacity to protect applicants on the ground. Before filling-in the application form, victims should think carefully about any risks that may arise as a result. They are advised to keep the fact that they have completed an ICC form confidential.

Once a victim has submitted an application, the Court keeps the application forms in a secure location, and registers the information provided by victims in the application form in a secure database to which only authorised staff of the ICC or persons specifically authorized by the Judges have access. In some cases, the Prosecutor or the Defence may be authorised to have access to the application form when necessary to preserve the rights of the accused to a fair and impartial trial. Judges will determine the level and timing of victims' participation, which can vary depending on the stage of the proceedings. The Court will work to ensure that victims are able to exercise their right to participate while also ensuring that the participation of victims does not interfere with the rights of the accused to a fair and impartial trial.

## 17. How are the legal representatives for victims identified?

In principle, victims have the right to choose their own legal representative; victims (or groups of victims) that lack the necessary means for such a legal representative may be provided financial assistance through the Court. Where there are many victims, the judges may ask victims to choose a common legal representative or representatives, in order to make the proceedings more efficient.

Victims' lawyers may attend court hearings, make oral or written submissions, provide evidence or be allowed to question witnesses.

In the past, legal representatives of victims have held both general informational meetings with victims to provide updates about developments in the proceedings (e.g. discussion of

witness testimony, questioning from the defence, etc.), and small group meetings to provide individuals opportunities to express their views about the case and personal experiences. The specific type of engagement between victims and their legal representatives will vary based on the case, the number of victims, and other factors, such as the security situation or stage of proceedings.

In the *Ali Kushayb case*, the judges in charge of the Trial (Trial Chamber I) have appointed Ms. von Wistinghausen and Mr. Nasser Amin Abdalla - two lawyers - to work as a single team of legal representatives, representing all victims throughout the trial which is set to start on 5 April 2022.

## 18. How can I apply to participate in the Ali Kushayb case?

To participate in the *Ali Kushayb case*, contact [VPRS.Information@icc-cpi](mailto:VPRS.Information@icc-cpi) and/or find the application form [here](#). You are advised to contact the Victims' Participation and Reparation Section (VPRS) of the ICC's Registry so that you can be provided with information, advice and training about victims' participation, and about how to complete the necessary forms. The process of applying, including all relevant application forms and information materials, is free of charge.

Victims who have suffered harm from one of the crimes charged against Mr. Abd Al-Rahman may be authorised to participate in the Abd-Al-Rahman trial.

Mr Abd Al-Rahman is charged for war crimes and crimes against humanity committed:

- During attacks on Kodoom and Bindisi committed against the predominantly Fur civilian population between 15 and 16 August 2003. This includes the charges of attack against the civilian population, murder, pillaging, destruction of property, forcible transfer, persecution, outrages upon personal dignity and other inhumane acts, rape, forcible transfer, and persecution.
- During attacks on Mukjar committed against the predominantly Fur civilian population between the end of February 2004 and the beginning of March 2004. This includes the charges of torture, other inhumane acts, cruel treatment as a war crime, outrages upon personal dignity, murder and attempted murder, and persecution.
- During attacks on Deleig and surrounding areas committed against the predominantly Fur civilian population between 5 and 7 March 2004. During these attacks hundreds of Fur males were arrested, detained, tortured and eventually executed. Mr Abd Al-Rahman is charged here for the crimes of torture, outrages upon personal dignity and other inhumane acts, murder, attempted murder, persecution, and cruel treatment.

## 19. How does the court decide who will be a witness?

The Office of the Prosecutor, the Defence, Judges or the victims' lawyer can ask any person who has relevant information about the crimes committed to tell what they know as a witness before the Court. Anyone who has relevant information can contact the lawyers, but witnesses are selected on the basis of the relevance of the information they have to the case, their reliability, and their credibility.

## 20. What steps does the ICC take to protect witnesses and victims participating in a trial?

Participating in criminal proceedings, by its very nature, involves an element of risk, but the security of victims and witnesses before the ICC comes first. The right to protection is an important right of victims and witnesses who are at risk because of their interaction with the Court. Emphasis is put on prevention as the Court has very limited capacity to respond when people are put at risk. Victims and witnesses need to be cautious when mentioning their involvement with the ICC and they should also avoid anything that would put them or anyone else at risk.

The Court may order specific protection measures to support witnesses who appear before the Court. Steps the Court can take to protect can include closing hearings to the public, using voice distortion and/or face pixelation, and/or by providing witnesses with pseudonyms. As a last resort, the Court can relocate witnesses and his or her close relatives to a different country.

Similarly, the Court may take preventative measures to protect any victims who are at risk because of their direct engagement with the Court, though victims rarely travel to the Court to participate directly in proceedings.

The Court maintains a secure electronic database with information on witnesses and victims to ensure ongoing protective measures, and all communications between victims and the Court are kept confidential. Victims' applications to the Court might be disclosed to the Prosecution and the Defence to ensure a fair trial. Access to this information by the Defence may be restricted by the Court to protect the safety of victims (when the Court determines that such a risk exists).

## 21. Are victims able to attend any proceedings in The Hague?

Generally, proceedings at the ICC are open to the public. However, victims typically do not physically attend proceedings in The Hague (The Netherlands) unless they are participating as witnesses in a trial or are authorised to present their views in person by the judges. Past

trials have been screened or aired on the radio in victims' local neighbourhoods and areas. See question #16 for more information on participating in the proceedings.

## **22. What type of reparations can the ICC provide to victims and their families, and how are any reparations determined?**

Victims can seek reparation for the harm that they have suffered if there is a conviction (i.e. the accused is found guilty of some or all of the crimes with which they have been charged). In that case, following additional proceedings aimed at establishing the accused's responsibility for the victims' personal harm as a result of the crimes for which they were convicted, the Trial Chamber may order the convicted person to pay reparations to victims. Where the guilty party is not able to pay the reparations ordered, the [Trust Fund for Victims](#) (based on funding from states and non-state entities) may complement the payment of awards for reparations.

Reparations may be awarded on an individual and/or a collective basis, depending on the particular situation. Reparations are awarded only to victims who have suffered harm as a consequence of the crimes for which the accused is found guilty. These reparations can include monetary compensation, return of property, rehabilitation, medical support, victims' service centres, or symbolic measures (e.g. apologies or memorials). Reparations are determined on the basis of the type of harm caused to direct and indirect victims as a result of the crimes for which the person was convicted.

In addition to reparations, the Trust Fund for Victims is responsible for carrying out the ICC's "assistance mandate," which is aimed at providing victims with physical and psychological rehabilitation and/or material support. Assistance is directed at situations on the ground in countries in which there are ongoing investigations by the ICC, like in Sudan. Assistance activities may begin once a situation comes under investigation, and after the Trust Fund notifies the Pre-Trial Chamber of its intent to undertake such activities. Assistance activities can be conducted without a conviction, and are not limited to harm stemming from the crimes charged in particular cases. Victims who suffer harm as a result of a crime within the Court's jurisdiction, as well as their families, may be eligible to receive assistance from the Trust Fund.

# ICC Outreach

## 23. Where can victims and others access ICC outreach materials?

Informational materials about the ICC are available at the ICC website, which can be found here: <https://www.icc-cpi.int/>. A specific section is devoted to the well-being of victims: <https://www.icc-cpi.int/about/victims>. The VPRS also prepared a booklet for victim participation that can be found here: [https://www.icc-cpi.int/about/victims/Documents/VPRS\\_Victim-s\\_booklet.pdf](https://www.icc-cpi.int/about/victims/Documents/VPRS_Victim-s_booklet.pdf).

The ICC Outreach Unit has also made accessible information materials tailored to the situation in Sudan at this link: <https://www.dropbox.com/sh/jjpaz3mf22jsupk/AAB2EcCDZpTJBgQoYfRoO-4ea?dl=0>.

The Trust Fund for Victims can be contacted at this email: [TrustFundforVictims@icc-cpi.int](mailto:TrustFundforVictims@icc-cpi.int). The TFV website can be found at this link: <https://www.trustfundforvictims.org/>.