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Justice for Serious International Crimes Committed in Sudan

Questions and Answers

Following months of protests, Sudan’s president for 30 years, Omar al-Bashir, was [ousted](#) in April 2019 and replaced by a transitional military council. Negotiations between the military leaders and opposition groups led in August to the formation of a transitional government headed by a “sovereign council,” with military and civilian members.

The agreement to form the transitional government provides for a national independent investigation into the crackdown by government security forces on peaceful protesters on June 3, 2019 in Khartoum – the [bloodiest attack](#) on protesters in the period before and after al-Bashir’s ouster. The agreement also calls for accountability for all past abuses under the al-Bashir government.

In September 2019 the transitional government appointed the national [investigation committee](#) for the June 3 events. The attorney general meanwhile announced efforts to investigate numerous past abuses and has [prosecuted](#) al-Bashir and other leaders on corruption charges.

In February 2020, Sudanese authorities expressed their [commitment](#) to cooperate with the International Criminal Court (ICC), which had outstanding arrest warrants for five Sudanese individuals, including al-Bashir, for alleged genocide, war crimes, or crimes against humanity committed in Darfur.

On June 9, one suspect, Ali Kosheib (also spelled Kushayb), [surrendered](#) himself to the ICC in the Central African Republic. This was a [landmark development](#) toward justice for victims of government-backed atrocities committed in Darfur.

Steps by Sudanese officials in support of justice are important and positive. But much more is needed for Sudanese authorities to seize the opportunity the transition offers to make a break from the country’s past of widespread atrocity crimes committed with impunity.

This is a pivotal moment for the country, and the African continent, to buttress accountability for the worst abuses, often committed by government or government-backed forces, and to offer redress for the victims. This opportunity should not be squandered.

This question-and-answers document addresses key issues in bringing justice for past serious crimes in violation of international law in Sudan, including the role of the ICC and national authorities, while recognizing that the global Covid-19 pandemic may delay some efforts.

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1. [What are the history and circumstances of the serious international crimes committed in Sudan?](#)

Government forces and non-state armed groups in Sudan have, over decades, carried out [grave and systemic violations](#) of human rights and international humanitarian law for which they have not been held accountable.

After [seizing power](#) by military coup in 1989, the National Islamic Front continued Sudan's extremely abusive civil war, ongoing since 1983, against Sudan People's Liberation Army (SPLA) rebels in Southern Sudan and in the Nuba mountains region of Southern Kordofan. When Omar al-Bashir seized power in 1991, the renamed ruling National Congress Party continued the war. Government forces and allied militia committed crimes on a massive scale, playing on ethnic divisions and pitting southerners against each other.

By 2002, internationally brokered peace talks led to several important agreements, followed by the Comprehensive Peace Agreement (CPA) in 2005. The CPA, however, [did not explicitly](#)

[address](#) accountability for serious international crimes and other gross abuses committed during the north-south conflict. The agreement also failed to address the crisis in Darfur.

Beginning in 2003 in Darfur, the Sudanese government and allied militias known as the “Janjaweed” committed crimes against humanity and war crimes, including sexual violence, as part of a counterinsurgency campaign. Civilians [suffered](#) direct attacks from land and air, summary execution, rape, torture, and pillaging of their property. Human Rights Watch has not taken a position on whether the intent required for the crime of [genocide](#) has been established based on the limitations of its own research.

In June 2011 in the state of Southern Kordofan, fighting resumed between Sudanese Armed Forces and former rebels from the area, now known as SPLM/A-North, and spread to Blue Nile state by September 2011. In both states, government forces used [abusive tactics](#), including indiscriminate [bombing](#) and targeted [attacks](#) on civilians, forcing hundreds of thousands of people to flee to other parts of Sudan or to refugee camps in South Sudan and Ethiopia.

These attacks may amount to war crimes and crimes against humanity, and created a humanitarian crisis, exacerbated when the government denied humanitarian agencies’ access to areas outside of government-controlled towns. Sudan’s obstruction of life-saving humanitarian aid to civilians in rebel-held areas caused further deprivation and undermined the right to basic services including food, medicine, and [reproductive healthcare](#).

Since 2011, Sudanese have also protested more frequently and in larger numbers over a range of grievances. In 2013, Sudan’s government responded to a wave of popular protests with extreme violence, [killing more than 170 people](#). Both before and after al-Bashir’s ouster, the government committed serious human rights violations against protesters. The most recent series of crackdowns started in [December 2018](#).

In the wake of al-Bashir’s ouster, Human Rights Watch found that fatal attacks on the protesters’ sit-in camp in Khartoum on June 3, 2019 – and in the days following in other neighborhoods of the capital and the neighboring cities of Bahri and Omdurman – were planned and could [amount](#) to crimes against humanity.

2. [Why is criminal accountability important?](#)

Lack of accountability for past violations has emboldened rights abusers to commit grave crimes in Sudan without fear of prosecution. Those responsible for atrocity crimes in southern Sudan during the civil war, and in Darfur, South Kordofan, and Blue Nile, continued attacks on civilians for years, and many remain in positions of power.

Following al-Bashir’s ouster, the transitional military council of army generals took over the government, with Mohamed “Hemedti” Hamdan Dagalo, as deputy. Hemedti, the commander of Sudan’s Rapid Security Forces (RSF), is implicated in grave crimes by the RSF against civilians

in [Darfur](#), [Southern Kordofan](#), and [Blue Nile](#) – including killings, mass rape, burning and looting of villages, and mass displacement of civilians.

After April 2019, RSF forces were more visible in Khartoum and implicated in the subsequent violence against protesters. Based on Human Rights Watch [research](#), security forces led by the RSF at the June 3 sit-in attack opened fire on unarmed protesters, killing scores, raping people, and injuring hundreds, and committed a range of other serious abuses.

International law mandates prosecuting serious international crimes, such as torture, crimes against humanity, and war crimes so that victims’ rights to truth, access to justice, and to an effective remedy are respected, as well as to combat impunity. Sudan is also bound by the Geneva Conventions, which require war crimes be prosecuted.

Human Rights Watch’s experience working in many different country contexts for more than 25 years reinforces our assessment that justice makes a crucial [contribution](#) to achieving long-term peace and stability by fostering respect for rule of law, while impunity tends to fuel the commission of further crimes.

Holding those responsible for atrocities to account will help promote an end to abuses during counter-insurgency operations, offer redress to victims and their families, and signal that atrocities will no longer be tolerated. Fair, credible prosecutions of the crimes will also show a commitment by the transitional authorities to abide by Sudan’s international legal obligations.

One year after the June 3 violent crackdown on protestors, Saadia Saif al-Deen, spokesperson for the victims’ families association, [told](#) Human Rights Watch: “We do not want the blood of our martyrs to be lost in vain. We want justice for them to be the pillar of our new country, where such abuses should not happen again.”

3. How should justice efforts be pursued? What kinds of cases are needed?

To bring about comprehensive accountability for serious international crimes committed in Sudan, it will be necessary for national authorities to develop prosecutorial strategies aimed at maximizing the positive impact of justice efforts. This should include cooperation with the ICC on its Darfur cases.

Countries often have to set priorities about which cases to pursue, particularly given the scope of crimes committed in Sudan. This should include focusing on those bearing greater degrees of responsibility and bringing charges that are representative of the breadth and brutality of crimes committed.

The International Criminal Court opened an investigation into crimes committed in Darfur in 2005, after the United Nations Security Council referred the situation to the ICC under Resolution 1593.

Five Sudanese individuals face ICC charges for war crimes, crimes against humanity, or genocide in Darfur: al-Bashir; Ahmed Haroun, former state minister for humanitarian affairs and former governor of Southern Kordofan state; Abdurraheem Mohammed Hussein, the former defense minister; Abdallah Banda Abakaer, leader of the rebel Justice and Equality Movement in Darfur; and Kosheib, who was a leader of the “Janjaweed” militia who also held commanding positions in Sudan’s auxiliary Popular Defense Forces and Central Reserve Police.

Al-Bashir, Haroun, and Hussein are in Sudanese custody. Two other Sudanese rebel leaders were charged with crimes related to an attack on an African Union base in Darfur, but one of them, Saleh Mohammed Jerbo Jamus, [died](#), and the ICC judges [declined](#) to confirm charges for the other, Bahar Idriss Abu Garda.

In 2005, Sudan created a [Special Criminal Court on the Events in Darfur](#), but the court [focused](#) primarily on ordinary crimes, as opposed to atrocity crimes, and [has been](#) inactive. The Sudanese government appointed various prosecutors but their work failed to [bring justice](#) for grave crimes in which the [authorities](#) were implicated. A member of Sudan’s Sovereign Council indicated in February that a new special criminal court to try crimes committed in Darfur would be established as a transitional justice mechanism for Darfur alongside the ICC, but further details have not yet been made available.

Attorney General Tajelsir El Hibir, who took up his post in October, has indicated that his office is investigating several cases involving past human rights abuses for possible prosecution: the torture and death of [Dr. Ali Fadul](#) in response to his participation in a doctors’ strike in 1990; the 1998 [al-Eilafoun military camp](#) murders; the killing of unarmed protesters in 2005 at [Port Sudan](#); the violent breakup of protests against [Kajbar dam](#); the [2013 and 2018-19 violent crackdowns](#) on peaceful protestors; and the more [recent violence](#) in Southern Kordofan, Blue Nile, and Darfur.

4. [What should happen with the ICC’s cases?](#)

Sudan’s former government refused to cooperate with the ICC, impeding the court’s ability to advance its cases. While it is not an ICC member, Sudan is under an obligation to cooperate with the court by virtue of UN Security Council resolution 1593 (2005). Invoking Chapter VII of the UN Charter, which bestows enforcement authority on the Security Council, the resolution provides 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 pursuant to this resolution.” Therefore the fact that Sudan has not ratified the Rome Statute, which created the ICC, is not a reason for the authorities to refuse to hand over suspects.

In February 2020, Mohammed Hassan al-Taishi, a member of Sudan’s ruling sovereign council, announced that Sudanese authorities would [cooperate](#) with the ICC. He told journalists at peace negotiations to end Sudan’s civil wars that the parties had agreed the ICC would be among the four mechanisms for transitional justice in Darfur.

“We agreed that everyone who had arrest warrants issued against them will appear before the ICC. I’m saying it very clearly,” he was [quoted](#) saying. Prime Minister Abdalla Hamdok and the Sovereign Council [confirmed](#) the government’s commitment to cooperate with the ICC during meetings in Khartoum with Human Rights Watch on February 12.

General Abel Fattah al-Burhan, who chairs the Sovereign Council, told Human Rights Watch: “We agreed no one is above the law, and that people will be brought to justice, be it in Sudan or outside Sudan with the help of the ICC.” He added: “[O]ur colleague announced yesterday...we will cooperate fully with the ICC.”

More than three months later, the authorities have yet to make good on that commitment. The ICC prosecutor [told](#) the UN Security Council on June 10 that the Office of the Prosecutor (OTP) has not been informed by the competent authorities of Sudan what actions they intend to take in relation to the ICC suspects. She asked the authorities of the government of Sudan to intensify dialogue with her office to ensure accountability for the crimes that have taken place in Darfur.

On June 16, the Sudanese attorney general [reaffirmed](#) the need for cooperation with the ICC, but also indicated it might be necessary for proceedings to be [held](#) in Sudan. Under Article 3 of the [Rome Statute](#) and Rule 100 of its Rules of Procedure and Evidence, the ICC can hold proceedings outside its headquarters in The Hague when the court [decides](#) to do so. Domestic authorities that are genuinely trying ICC cases before their domestic courts can also challenge the ICC’s authority to continue its cases, which is discussed in question 5.

Sudan’s authorities should contact the ICC without delay to begin discussions on cooperation, including transferring the suspects to ICC custody. They should liaise with the ICC on what else it may need for its existing ICC investigations given the previous government’s obstruction. Allowing the ICC unhindered access to safely conduct investigative activities in Sudan could be particularly important. Providing documents or other evidence may also be needed.

5. Can the ICC cases progress parallel to domestic cases?

ICC cases can continue while Sudan pursues domestic cases involving other suspects. Indeed, this recognizes that the most high-level suspects – whose cases may be the most sensitive or difficult – may be best left to the ICC as an international court designed to deliver justice, while other cases progress before domestic courts.

If a country’s judicial system is trying an ICC suspect for the same crimes covered by an ICC arrest warrant, as opposed to other crimes, the country’s authorities may challenge the ICC’s jurisdiction over that case. Under an “admissibility challenge,” the country makes a submission to the ICC judges to demonstrate that national courts are genuinely prosecuting the case. This is covered in Articles 17-19 of the Rome Statute.

It is ultimately up to the ICC judges to determine whether national proceedings meet the criteria. The court in its case law to date has clarified that an admissibility challenge cannot be based on the promise of future proceedings, but rather on cases underway. If an admissibility challenge is properly filed, a country may postpone surrendering a suspect while the challenge is litigated, which is discussed in Article 95 of the Rome Statute.

Cases involving the same suspects for other crimes – such as corruption or incidents outside Darfur – do not suspend or negate the immediate obligation to surrender the ICC suspects. But under Article 89(4) of the Rome Statute, a country may consult with the ICC on the surrender.

6. What are the standards for national prosecutions of serious international crimes committed in Sudan, including war crimes and crimes against humanity?

To provide justice to victims and defendants, as well as to reestablish trust in judicial institutions, it is essential not only for countries to put criminal suspects for past human rights violations on trial, but for the trials to be credible and fair, in accordance with international standards and practice.

Accountability before domestic courts is preferable when it can be done fairly and effectively. Otherwise, other options should be pursued. Several African governments have experience trying grave crimes before hybrid courts that involve both domestic and international judges and prosecutors, including the [Central African Republic](#), [Sierra Leone](#), and [Senegal](#). The African Union and the UN have assisted with such efforts. The ICC may be able to cooperate with such initiatives in certain instances, such as by sharing information on suspects.

Trials for serious international crimes should meet the following benchmarks, the same standards that should apply to anyone brought to justice for a serious criminal offense:

- Prompt, independent, and impartial investigation and prosecution of the crimes;
- Rigorous implementation of internationally recognized standards of fair trial, including rights of the accused, as detailed in Article 14 of the [International Covenant on Civil and Political Rights](#) (ICCPR);
- Appropriate penalties that reflect the gravity of the crime in the event of conviction, which should include imprisonment, but not the death penalty.

International law and practice on trials involving serious international crimes has also [reinforced](#) the importance of:

- Protection and support for witnesses and victims involved in the proceedings.
- Security for judges, court staff, and defense counsel to work free from threat and harm;
- Opportunities for victims to be involved in the process, beyond serving as witnesses;
- Making information about justice efforts available to the populations most affected by the crimes, including as they may have limited experience with criminal proceedings.

7. [What changes will be needed to Sudanese law to enable prosecutions and trials of serious international crimes committed?](#)

Genocide, war crimes, and crimes against humanity are included in the 1991 Criminal Act (as amended in 2009), but the definitions are inadequate. For example, the crime of genocide is more [narrowly defined](#) than under international law, and the war crimes of inhuman treatment, sexual violence, denial of fair trial, and sexual slavery are either absent or incomplete. All the definitions of serious international crimes should be amended to be more consistent with accepted definitions under international law, such as the ICC's Rome Statute, to fully encompass the crimes.

Sudanese law does not provide for someone to be held criminally liable on the basis of command responsibility, the legal principle that holds a superior responsible for crimes committed by his subordinates when they knew or should have known that the crimes were being committed but failed to take reasonable measures to stop them or punish them. The availability of this mode of liability may be important to ensure accountability for leaders in the commission of grave crimes.

Sudanese law also includes far-reaching [immunities](#) for members of the security services. The Armed Forces Act of 2007, the Police Act of 2008, and the National Security Act of 2010 all provide for immunity from prosecution of officials, unless approval is granted by higher-level officials, including the commander-in-chief in some instances.

The [Constitutional Charter](#) for the transitional period also prohibits criminal proceedings against any members of the Sovereign Council, Cabinet, or Transitional Legislative Council or governors, unless the Legislative Council votes by majority to allow it. Until the Legislative Council is formed, any lifting of immunity rests on action by the Constitutional Court. The Sudanese Criminal Procedures Act of 1991 also sets a 10-year statute of limitations for serious crimes. International standards make clear that those implicated in atrocity crimes should not be shielded from the reach of the law by immunity provisions or statutes of limitations.

In addition, investigations and adjudication of grave crimes can be complex. Cases can involve many incidents, in many locations, over a long period of time, and not all those responsible may have been present at the crime scene during the commission of the crime. Sudanese justice practitioners – including investigators, prosecutors, judges, and the defense bar – have limited practical experience with these types of cases. Efforts should be made to leverage expertise that has been [accumulated](#) in Africa and internationally over the past three decades to investigate and prosecute these atrocity crimes.

8. [What changes are needed to foster fair trials?](#)

There are major gaps in fair trial protections under Sudanese law.

The 1991 Criminal Procedures Act and the 2019 [Constitutional Charter](#) enumerate protections of the rights of the accused, including the right to be presumed innocent, to have legal assistance, to be informed promptly of charges, and to be present for the trial.

At the same time, there is a lack of clarity as to when access to a lawyer begins. The right to a lawyer is not [guaranteed](#) from the start of criminal proceedings and has not been [implemented](#) in practice.

Torture of suspects was prohibited by Sudan's [Interim National Constitution](#) and is prohibited by the Constitutional Charter, but torture of detainees by Sudanese authorities has been widely [documented](#). The 1994 Evidence Act also allows the court to accept evidence even if it was [obtained](#) in an improper manner as long it believes the evidence is [genuine](#), which leaves open risks that confessions obtained through ill-treatment or torture will be used as evidence. The Constitutional Court has repeatedly [dismissed](#) defendants' allegations that evidence used in trials had been obtained by means of torture.

The death penalty is [permissible](#) under Sudanese law, and applies to more than a dozen offenses under the 1991 Criminal Act, as amended in 2009, including for genocide, war crimes, and crimes against humanity. The Anti-Terrorism Act also allows the death penalty. The Constitutional Charter limits when the death penalty may be imposed, but still [allows](#) it. Human Rights Watch believes the death penalty should not be available in any circumstances, as it is an inherently cruel and inhuman punishment.

Corporal punishment, including [amputation](#) and [whipping](#), is [permissible](#) under Sudan's 1991 Criminal Act. These punishments are inconsistent with the ban on torture and cruel, inhuman, or degrading treatment or punishment.

Sudan's judiciary, under the former regime, was long known to be subject to [political interference](#). The Constitutional Charter provides that the judiciary should operate independently. But putting this principle into practice is likely to require major reforms.

The Constitutional Charter provides for key steps to reform the judiciary, including the formation of a judicial reform commission, which can bolster the judiciary's independence through new procedures in the selection and appointment of judges. The commission is yet to be established.

9. [**What is needed to ensure that witnesses and victims can participate in the process, and to make the process meaningful to the communities that have been most affected by the crimes?**](#)

Sudan's 1991 Criminal Procedure Act provides that witnesses should be protected "against such phrases and comments, as may intimidate, or injure them, and forbid the questions of obscene

nature, or injurious to the feelings, unless they correspond to substantial facts, relating to the suit.” But there is no program to ensure protection and support for witnesses and victims involved in sensitive cases in the country.

Witnesses and victims involved in sensitive cases may face threats to their safety and well-being, or that of their family. The following [protections and assistance](#) should be available to them: individual risk assessments of witnesses and victims involved in sensitive cases; use of pseudonyms and other measures to protect identities from the public as needed; psychosocial assistance and medical care; possible in-country relocation; and post-testimony follow-up to assess continued risk, and further protection and support measures if needed.

Participation by victims of the crimes in the judicial process, beyond serving as witnesses, can help increase victims’ [access to justice](#) and securing of [reparations](#), as well as make accountability efforts more meaningful to those who have been most affected by the crimes.

Under Sudan’s 1991 Criminal Procedures Act, a victim can request to make statements at trial, and compensation to victims of crimes is available for some offenses. A victim may also take a prosecution forward on their own initiative, with the approval of the Criminal Prosecution Bureau.

One Sudanese legal expert told Human Rights Watch that in practice, victims are often blocked from participating in criminal proceedings by judges and prosecutors. Victims also have been [unable](#) to use the opportunities to participate due to immunities applicable to alleged perpetrators and the lack of witness and victim protection in Sudan.

Authorities should review existing law and practice to enable victims to participate meaningfully in the justice process and to seek reparations.

Timely outreach to affected communities on accountability efforts in local languages is also important to avoid confusion and misunderstanding, and to increase any positive effects of proceedings. Outreach and public information activities are not a regular feature of most domestic justice systems, including Sudan, and need to be developed.

10. [What should be the next steps?](#)

Sudanese authorities should act on their public commitments to secure justice for past atrocity crimes, by taking concrete steps to advance these efforts, such as:

- Contact the ICC without delay to begin discussions on cooperation, including to coordinate transferring suspects to ICC custody, and providing the ICC with any cooperation it may need for its cases, including unhindered access to conduct investigative steps in Sudan;

- Convene a task force to develop a strategy for criminal accountability for the most serious past violations and abuses. The strategy should include establishing [specialized](#) prosecutorial and judicial mechanisms to mobilize resources and attention to progress on cases;
- Embark on needed legal and institutional reform to foster accountability for the most serious past violations: establishing the envisioned commissions for transitional justice, human rights, and law reform, which may play an important coordinating role; lifting immunity for officials and members of security forces; adding command responsibility as a form of liability and definitions of international crimes that are more consistent with international law; establishing the judicial reform commission; creating a witness and victim protection and support program; increasing victim participation in criminal proceedings; and providing training in investigating and trying serious international crimes; and
- Discuss plans to investigate and prosecute past serious international crimes with international partners, and determine what international and regional assistance and expertise may be available to support such efforts.

Sudan's international partners, including foreign governments, and the UN, African Union, and European Union, should:

- Affirm the need for fair, credible prosecutions of past atrocity crimes;
- Express the importance of cooperation with the ICC in its Darfur cases; and
- Identify expertise and assistance that may be available to support such efforts.

This Q&A was updated on July 8, 2020 to reflect a clarification by the Office of the Prosecutor of the ICC on the communication between the ICC and Sudanese authorities on the ICC suspects.