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PRE-TRIAL CHAMBER II

Before: Judge Rosario Salvatore Aitala, Presiding Judge
Judge Antoine Kesia-Mbe Mindua
Judge Tomoko Akane

SITUATION IN DARFUR, SUDAN

Public

Public Redacted Version of “Prosecution’s Response to ‘Order for clarification as to the Prosecutor’s statements before the United Nations Security Council’, 24 January 2022, ICC-02/05-253”

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

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I. INTRODUCTION

1. On 24 January 2022, Pre-Trial Chamber II (“Chamber”) ordered the Office of the Prosecutor (“Office” or “Prosecution”) to file submissions clarifying the statement¹ made by Prosecutor Karim A.A. Khan QC² during the Thirty-Fourth Report of the Prosecutor of the International Criminal Court to the United Nations Security Council (“UNSC”) Pursuant to Resolution 1593 (2005) on 17 January 2022 (“34th UNSC Report”).³ In doing so, the Chamber expressed “serious concern” about these statements without specifying the exact nature of its concern or, with respect, the sufficient legal basis for its order for clarification regarding an out-of-court statement to the UNSC.⁴

2. The Chamber’s reasons for ordering clarification of the Prosecutor’s routine report to the UNSC on a seemingly urgent basis, reflected by its accelerated deadline to respond, are therefore not readily apparent. Since the initiation of the Darfur investigation on 1 June 2005,⁵ the Office has delivered 33 previous reports to the UNSC describing both its successes and shortcomings. The Prosecution is not aware of any order of this nature being made by the Chamber relating to any previous UNSC report, even when Prosecutor Bensouda “hibernated” the Darfur situation.⁶

3. Notwithstanding the reasons for the Chamber’s “serious concern” over Prosecutor Khan’s first report on Sudan and the 34th UNSC Report in total, and without prejudice to any issue over the *vires* of the order, the Prosecutor files the below submissions in a sincere bid to assist the Chamber with the hope that it may further clarify what he stated in the 34th UNSC Report regarding the cases against Mr Omar

¹ [ICC-02/05-253](#) (“Order”), p. 5.

² [Statement of ICC Prosecutor, Karim A.A. Khan QC, to the UNSC on the Situation in Darfur, pursuant to Resolution 1593 \(2005\)](#) (“UNSC Speech”), para. 5.

³ [Thirty-Fourth Report of the Prosecutor of the ICC to the UNSC Pursuant to UNSCR 1593 \(2005\)](#) (“34th UNSC Report”), paras. 34-37.

⁴ [Order](#), para. 4.

⁵ [ICC-02/05-2](#).

⁶ As mentioned in the 34th UNSC Report, former Prosecutor Bensouda made the decision to “hibernate the investigation until such time as cooperation from Sudan and the international community became meaningful.” [34th UNSC Report](#), para. 34.

Hassan Ahmad Al Bashir (“Mr Al Bashir”) and Mr Abdel Raheem Muhammad Hussein (“Mr Hussein”).

4. Reports presented by the Prosecutor of the ICC to the UNSC relating to the Darfur situation are mandated under UNSCR 1593 (2005). The Prosecutor maintains that he must report faithfully and with as much candour as possible to the UNSC, whilst respecting the criminal nature of investigations and various Rome Statute obligations, including those to victims and witnesses, and obligations relating to the confidentiality of information received. The 34th UNSC Report and oral statement of the Prosecutor fully comply with these imperatives.

5. Immediately upon assuming office in June 2021, Prosecutor Khan directed the Office to conduct a comprehensive review of all cases and situations under investigation, the first of which was the Darfur case file.⁷ As a result of this review, the Prosecution has determined that further investigation and strengthening of the evidence is urgently required in the cases of Messrs Al Bashir and Hussein to ensure that they meet the standard required for the confirmation of charges and trial. It was these essential points that the Prosecutor communicated in his oral statement and the 34th UNSC Report.

II. CLASSIFICATION

6. Pursuant to regulation 23bis(1) of the Regulations of the Court, this response is classified as confidential, *ex parte*, available only to the Prosecution, because it contains sensitive information regarding the conduct of the Prosecution’s investigations.

III. SUBMISSIONS

The evidence underlying the arrest warrants for Messrs Al Bashir and Hussein meets the “reasonable grounds to believe” standard under article 58(1)(a)

7. Pre-Trial Chamber I has already determined that the facts provided by the Prosecution were sufficient to meet the burden of proof required under article 58(1) of

⁷ [34th UNSC Report](#), para. 3.

the Rome Statute for the issuance of arrest warrants for Mr Al Bashir in 2009⁸ and 2010,⁹ and Mr Hussein in 2012,¹⁰ respectively. The Prosecutor has specifically considered whether this standard continues to be met, and it is. In other words, there are no changed circumstances that necessitate an application to withdraw any warrant at this stage. This issue will, naturally, be kept under close review, and the Prosecutor will not hesitate to seize the Chamber of an application should the situation change, as required by the Rome Statute and his obligations as an officer of the Court.

8. Whilst the evidence underlying the arrest warrants for Messrs Al Bashir and Hussein continues, therefore, to meet the “reasonable grounds to believe” standard under article 58(1)(a) on the basis of its ongoing review,¹¹ it is clear to the Prosecutor that the cases against those suspects are far from trial ready. The review of the Darfur case file was the first to be conducted by the Office¹² pursuant to the Prosecutor’s instructions that all cases under investigation or in trial be reviewed by the Office for sufficiency of evidence. The Darfur review was also expedited in light of the Prosecutor’s instructions that situations referred by the UNSC must be prioritised by the Office.¹³ This review follows other internal evidence reviews that have been periodically conducted by the Office in the Darfur situation.

9. Accordingly, between July-August 2021, the Office conducted an assessment of the evidence underlying the arrest warrants for Messrs Al Bashir, Hussein and Ahmad Muhammad Harun (“Mr Harun”) to determine whether there were still reasonable grounds to believe that they held individual criminal responsibility for the crimes charged.

⁸ [ICC-02/05-157-AnxA](#); [ICC-02/05-01/09-3](#); [ICC-02/05-01/09-1](#).

⁹ [ICC-02/05-157-AnxA](#); [ICC-02/05-01/09-73](#); [ICC-02/05-01/09-94](#); [ICC-02/05-01/09-95](#).

¹⁰ [ICC-02/05-237-Red](#); [ICC-02/05-01/12-1-Red](#); [ICC-02/05-01/12-2](#).

¹¹ The Prosecution recalls that the “reasonable grounds to believe” standard of review for the issuance of arrest warrants under article 58(1)(a) of the Rome Statute only requires that the conclusion reached on the facts be “one of several reasonable conclusions available on the materials provided by the Prosecution(...)”. [ICC-02/05-01/09-94](#), para. 1 (citing [ICC-02/05-01/09-73](#), paras. 1, 33, 39). See also [ICC-01/09-19](#), para. 33.

¹² [34th UNSC Report](#), para. 3.

¹³ Prosecutor Khan also noted that the Office will “extend particular prioritization to referrals by the [UNSC]” in his first report to the UNSC regarding the Libya investigation on 23 November 2021. [Twenty-Second Report of the Prosecutor of the International Criminal Court to the UNSC Pursuant to UNSC Resolution 1970 \(2011\)](#), para. 3.

10. Upon completing its review, the Office determined that there had been no material impact on the decisions by Pre-Trial Chamber I to issue arrest warrants for Messrs Al Bashir, Hussein and Harun. However, in the course of this review, the Office assessed that additional evidence was required to make the cases ready for trial in accordance with the recent practice of the Office. These deficiencies were due in large part to lack of cooperation throughout the Darfur investigation that led to its hibernation.¹⁴ The evidential landscape and challenges detailed above found summary form in the Prosecutor's 34th UNSC Report and oral statement to the UNSC.

11. Given the review conducted and gaps identified, the Prosecutor took a number of steps in a bid to strengthen the Darfur cases, in particular the cases against Messrs Al Bashir and Hussein. These steps include conducting follow up missions to Sudan in August 2021, appointing a Special Adviser on Darfur, making arrangements to establish a permanent field office in Khartoum, allocating greater resources to the Darfur investigation, providing additional Arabic language resources to the team and executing a second Memorandum of Understanding with the Government of Sudan ("GoS") which extended the scope of cooperation to include each of the four suspects not currently in ICC custody. All of these steps were adumbrated in the Prosecutor's 34th UNSC Report and oral statement to the UNSC.¹⁵

12. It is important to underline that the aforementioned steps were all taken to ensure thorough investigations in accordance with the Rome Statute in general, and Article 54(1)(a) in particular, which requires the Prosecutor, "[i]n order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally".¹⁶

The Office strives to apply the reasonable prospect of conviction standard at all stages of proceedings

¹⁴ [34th UNSC Report](#), para. 34.

¹⁵ [34th UNSC Report](#), paras. 6-7, 11-18, 27; [UNSC Speech](#), paras. 6, 9.

¹⁶ Article 54(1)(a).

13. Since the issuance of the arrest warrants for Mr Al Bashir in 2009 and 2010, and Mr Hussein in 2012, respectively, the Prosecution has adopted a prosecutorial and investigative strategy that seeks to apply even more stringent standards to its case management. The Office now strives to apply the reasonable prospect of conviction,¹⁷ or “trial ready,”¹⁸ standard for the assessment of individual criminal responsibility at all stages of its investigations and trials. Prosecutor Khan’s accurate and carefully calibrated statements in the 34th UNSC Report regarding the strength of the evidence in the cases against Messrs Al Bashir and Hussein reflect this rigorous approach and should be interpreted as such.

14. It is well-established that the Prosecution has faced a persistent lack of cooperation from the GoS in all of the Darfur cases, including the cases of Messrs Al Bashir¹⁹ and Hussein, until October 2020.²⁰ In its previous reports to the UNSC, the Prosecution has consistently maintained that it cannot successfully discharge its duties in the Darfur investigation without GoS assistance to access documents, crime scenes and witnesses in Sudan.²¹

¹⁷ “At various stages in the process of investigating and prosecuting a case (particularly before applying for an arrest warrant or a summons to appear and before submitting a Document Containing the Charges), the Office will conduct a comprehensive evidence review involving Office staff external to the team to whom an investigation or prosecution is assigned, to scrutinise the sufficiency of the evidence for the relevant stage of the proceedings and to assess whether the Office can conduct an effective and successful investigation leading to a prosecution with a reasonable prospect of conviction.” [Office of the Prosecutor Policy Paper on Case Selection and Prioritisation](#), para. 23.

¹⁸ “Given the expectation from the judges to receive cases which are trial-ready at the time of the confirmation hearing and with more substantiated evidence, the Office is adapting its prosecutorial strategy accordingly. First of all, it will expand and diversify its collection of evidence so as to meet the expectations of the Chambers. Secondly, it will apply multiple case hypotheses – incriminating and exonerating – throughout the investigation which will further strengthen decision-making in relation to actual prosecutions. Thirdly, the Office will aim at presenting cases at confirmation hearing that are as trial ready as possible. If meeting such a threshold would not be possible at the moment of applying for an arrest warrant or summons to appear (e.g. arrest opportunity, witnesses only willing to cooperate after an arrest), the Office intends to only proceed with the application if there are sufficient prospects to further collect evidence to be trial-ready within a reasonable timeframe.” [Office of the Prosecutor Strategic Plan June 2012-2015](#), para. 23.

¹⁹ The significant challenges that the Office has also faced in securing the cooperation of other States for the investigation and arrest of Mr Al Bashir, in particular, are well-documented in the Court’s jurisprudence. See e.g. [ICC-02/05-01/09-309](#); [ICC-02/05-01/09-397-Corr](#); [ICC-02/05-01/09-302](#).

²⁰ [34th UNSC Report](#), paras. 34-40.

²¹ See e.g. [Sixth Report of the Prosecutor of the ICC to the UNSC Pursuant to UNSCR 1593 \(2005\)](#), para. 26; [Tenth Report of the Prosecutor of the ICC to the UNSC Pursuant to UNSCR 1593 \(2005\)](#), para. 42; [Twelfth Report of the Prosecutor of the ICC to the UNSC Pursuant to UNSCR 1593 \(2005\)](#), paras. 57-58; [Thirtieth Report of the Prosecutor of the ICC to the UNSC Pursuant to UNSCR 1593 \(2005\)](#), para. 26; [Thirty-First Report of the Prosecutor of the ICC to the UNSC Pursuant to UNSCR 1593 \(2005\)](#), para. 27.

15. The purpose of the Prosecutor's statement to the UNSC was to flesh out aspects of the 34th UNSC Report regarding the cases against Messrs Al Bashir and Hussein. It was an effort to impress on the UNSC the urgent need for cooperation from all stakeholders in order to further the investigation beyond its current state. As the Prosecutor stressed, the Darfur investigation "requires assistance from Sudan and it also requires cooperation, collaboration from members of this Council and member states of the United Nations."²²

The Office continues to faithfully exercise its ethical and professional responsibilities

16. Under article 42(1) of the Rome Statute, the Office acts independently as a separate organ of the Court that is responsible for, *inter alia*, receiving referrals, examining them and conducting investigations and prosecutions without influence from any external source.²³ The Chamber has not provided any details regarding the exact nature of its "concern" with the Prosecutor's remarks, nor has it specified a legal basis on which to question the Office's proper exercise of its prosecutorial discretion.²⁴

17. The ethical and professional obligation to continuously re-evaluate the evidence underlying charges is incumbent upon the Prosecution under the Rome Statute and the Regulations of the Office.²⁵ Moreover, the Prosecutor is acutely aware of his continuing obligation to not only respect the interests of the victims and witnesses in the Darfur investigation but also the rights of the accused.²⁶ The Office strives to discharge these obligations with dedication and professional judgment.

18. The Prosecutor is cognisant of his responsibilities under the Rome Statute and will make his best efforts to sincerely discharge the same. It is incumbent on the Prosecutor to make decisions and statements that are required of him pursuant to these responsibilities. These responsibilities include his obligations to victims and witnesses,

²² [UNSC Speech](#), para. 5.

²³ Article 42(1) of the Statute.

²⁴ [REDACTED].

²⁵ Regulation 60 of the [Regulations of the Office of the Prosecutor](#). The Prosecution has demonstrated that it will request the withdrawal of arrest warrants when appropriate and without delay pursuant to articles 61(4), 61(9), 61(10) and 58(4) of the Statute, [REDACTED]; [ICC-02/11-01/12-89](#).

²⁶ Article 54(1)(c) of the Statute.

duties as an officer of the Court, including his obligation to comply with all judicial orders, and his obligations to report to the UNSC. The Prosecutor will continue to present accurate information to the UNSC and work towards progressing investigations or prosecutions in those situations that are referred by it, in accordance with the Rome Statute.

IV. CONCLUSION

19. The Prosecutor trusts that this response fully addresses the matters that gave rise to the Chamber's order and provides context and clarification regarding the 34th UNSC Report recently presented.

20. Respectfully submitted,



Karim A.A. Khan QC
Prosecutor

Dated this 27th day of January 2022

At The Hague, The Netherlands