

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-02/05-01/09
Date: 18 November 2013

PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Presiding Judge
Judge Hans-Peter Kaul
Judge Cuno Tarfusser

SITUATION IN DARFUR, SUDAN

THE PROSECUTOR V. OMAR HASSAN AHMAD AL BASHIR

**Public
Urgent**

Decision Regarding Omar Al-Bashir's Potential Travel to the State of Kuwait

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

The Office of the Prosecutor

Fatou Bensouda, Prosecutor

James Stewart, Deputy Prosecutor

Counsel for the Defence

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States Representatives

Competent authorities of
the State of Kuwait

Amicus Curiae

REGISTRY

Registrar

Herman von Hebel

Deputy Registrar

Didier Preira

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Others

Pre-Trial Chamber II (the “Chamber”) of the International Criminal Court (the “Court”) renders this decision on the “Prosecution’s urgent notification of travel in the case of *The Prosecutor v Omar Al Bashir*” (the “Prosecutor’s Urgent Notification”, or the “Urgent Notification”).¹

1. On 31 March 2005, the Security Council (the “SC”), acting under Chapter VII of the Charter of the United Nations (the “UN”), adopted Resolution 1593 (2005) referring the situation in Darfur to the Court.²

2. On 4 March 2009 and 12 July 2010, Pre-Trial Chamber I (the “PTC I”), formerly seized of the present case, issued two warrants of arrest against Omar Hassan Ahmad Al-Bashir (“Mr. Al-Bashir”).³ These warrants of arrest remain to be executed.

3. On 6 March 2009 and 21 July 2010, acting upon PTC I’s request,⁴ the Registrar prepared and transmitted two requests for the arrest and surrender of Mr. Al-Bashir for the purposes of the execution of the two warrants of arrest.⁵

4. On 15 March 2012, the Presidency issued the “Decision on the constitution of Pre-Trial Chambers and on the assignment of the Democratic Republic of the

¹ ICC-02/05-01/09-168 and its annex A.

² S/RES/1593 (2005).

³ Pre-Trial Chamber I, “Warrant of Arrest for Omar Hassan Ahmad Al Bashir”, 4 March 2009, ICC-02/05-01/09-1; Pre-Trial Chamber I, “Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir”, 4 March 2009, ICC-02/05-01/09-3; Pre-Trial Chamber I, “Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir”, 12 July 2010, ICC-02/05-01/09-95; Pre-Trial Chamber I, “Second Decision on the Prosecution’s Application for a Warrant of Arrest”, 12 July 2010, ICC-02/05-01/09-94.

⁴ Pre-Trial Chamber I, “Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir”, 4 March 2009, ICC-02/05-01/09-3, p. 93; Pre-Trial Chamber I, “Second Decision on the Prosecution’s Application for a Warrant of Arrest”, 12 July 2010, ICC-02/05-01/09-94, p. 29.

⁵ ICC-02/05-01/09-8; ICC-02/05-01/09-97.

Congo, Darfur, Sudan and Côte d'Ivoire situations", in which it re-assigned, *inter alia*, the situation of Darfur, Sudan to this Chamber.⁶

5. On 18 November 2013, the Chamber received the Prosecutor's Urgent Notification, in which she avers, on the basis of news reports,⁷ that Mr. Al-Bashir will travel to the State of Kuwait, to attend "a four-way African summit on 18 and 19 November [2013] and the third Arab-African Summit",⁸ which will take place on 19 and 20 November 2013 in the same country.⁹ Consequently, the Prosecutor requests the Chamber to take steps "to ensure that the arrest warrants are executed" and in particular to (i) seek information from the relevant authorities of the State of Kuwait regarding said visit; (ii) remind those authorities of the existence of the warrants of arrest against Mr. Al-Bashir; (iii) remind those authorities of SC Resolution 1593 (2005); and (iv) consider informing the SC of the situation.¹⁰

6. The Chamber notes articles 86, 87(5), 89(1) and 92 of the Rome Statute (the "Statute").

7. The Chamber highlights that only States Parties to the Statute are under an obligation to cooperate with the Court. Given that the Statute is an international treaty governed by the rules set out under the Vienna Convention on the Law of Treaties, it is only with the State's consent that the Statute can impose obligations on a non-State Party.¹¹ Thus, non-States Parties may decide to

⁶ Presidency, ICC-02/05-01/09-143.

⁷ ICC-02/05-01/09-168, Annex A.

⁸ ICC-02/05-01/09-168, p. 3.

⁹ ICC-02/05-01/09-168, pp. 3-4 ; ICC-02/05-01/09-168, Annex A.

¹⁰ ICC-02/05-01/09-168, p. 5.

¹¹ UNTS, Vol. 1155, art. 34; See also Pre-Trial Chamber II, "Decision Regarding Omar Al-Bashir's Potential Travel to the Federal Republic of Ethiopia and the Kingdom of Saudi Arabia", 10

cooperate with the Court on an *ad hoc* basis, as foreseen in article 87(5)(a) of the Statute. This principle may be altered by the SC which may, by means of a resolution adopted under Chapter VII of the UN Charter, create an obligation to cooperate with the Court on those UN Member States which are not parties to the Statute. In such a case, the obligation to cooperate stems directly from the UN Charter.

8. Accordingly, the State of Kuwait, as non-State Party to the Statute, has no obligations *vis-à-vis* the Court arising from the Statute. In this regard, the Chamber recalls that the situation in Darfur was referred to the Court by way of SC Resolution 1593 (2005), which also recognizes that States not parties to the Statute (apart from Sudan) have no obligation under the Statute. However, SC Resolution 1593(2005) still “urge[d] *all States* and concerned regional and other international organizations to cooperate fully” with the Court (emphasis added).¹²

9. In this context the Chamber wishes to point out that the Court has no enforcement mechanism and thus relies on the States’ cooperation, without which it cannot fulfil its mandate and contribute to ending impunity.

FOR THESE REASONS, THE CHAMBER HEREBY

- a) orders the Registrar to transmit to the State of Kuwait the requests for arrest and surrender issued by the Registry on 6 March 2009 and 21 July

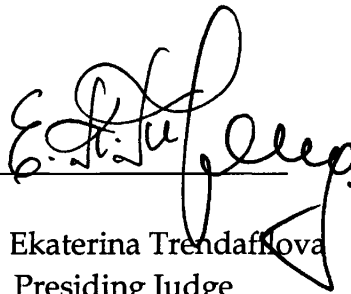
October 2013, ICC-02/05-01/09-164, para. 7; Pre-Trial Chamber I, “Decision on the request of the Defence of Abdullah Al-Senussi to make a finding of non-cooperation by the Islamic Republic of Mauritania and refer the matter to the Security Council”, 28 August 2013, ICC-01/11-01/11-420, para. 12.

¹² S/RES/1593 (2005).

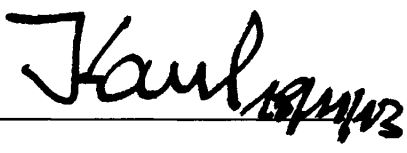
2010; or in case of urgency, to request, in accordance with article 92 of the Statute, the provisional arrest of Omar Hassan Ahmad Al-Bashir;

- b) orders** the Registrar to send a Note Verbale to the State of Kuwait, enquiring about said visit, reminding said State of the SC Resolution 1593(2005) and inviting it to cooperate with the Court in the arrest and surrender of Omar Hassan Ahmad Al-Bashir to the Court;
- c) orders** the Registrar to notify the present decision, to the competent authorities of the State of Kuwait;
- d) orders** the Registrar to prepare a report to be filed with the Chamber in due course concerning said visit; and
- e) invites** the competent authorities of the State of Kuwait to arrest Omar Hassan Ahmad Al-Bashir and surrender him to the Court, in the event he enters its territory.

Done in both English and French, the English version being authoritative.



Judge Ekaterina Trendafilova
Presiding Judge



Judge Hans-Peter Kaul Judge Cuno Tarfusser

Dated this Monday, 18 November 2013

At The Hague, The Netherlands