



Original: English

No.: ICC-02/05-01/09
Date: 8 December 2014

PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Presiding Judge
Judge Cuno Tarfusser
Judge Christine Van Den Wyngaert

**SITUATION IN DARFUR, SUDAN
IN THE CASE OF
*THE PROSECUTOR V. OMAR HASSAN AHMAD AL BASHIR***

**Public
Urgent**

Decision on the “Prosecution’s Notification of Travel in the Case of *The Prosecutor v Omar Al Bashir*”

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 Federal Republic of Ethiopia

Amicus Curiae

REGISTRY

Registrar

Herman von Hebel

Deputy Registrar

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 Notification of Travel in the case of *The Prosecutor v Omar Al Bashir*” (the “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 (the “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 instruction, the Registrar prepared and transmitted two requests to, *inter alia*, all UN SC members that are not States Parties to the Rome Statute for the arrest and surrender of Mr. Al-Bashir for the purposes of the execution of the Warrants of Arrest.⁴

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-02/05-01/09-217 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-02/04-01/09-3; 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 ICC-02/05-01/09-8 and 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.⁵

5. On 10 October 2013, the Chamber issued the "Decision Regarding Omar Al-Bashir's Potential Travel to the Federal Republic of Ethiopia and the Kingdom of Saudi Arabia" (the "10 October 2013 Decision").⁶

6. On 8 December 2014, the Chamber received the Notification, in which the Prosecutor avers that, on the basis of media reports, Mr. Al-Bashir travelled to the Federal Republic of Ethiopia on 8 December 2014 in order to celebrate the "20th anniversary [...] of the Ethiopian Constitution".⁷ Accordingly, the Prosecutor requests the Chamber to take steps to ensure that the Warrants of Arrest against Mr. Al-Bashir are executed. The Prosecutor also requests the Chamber to (i) seek information from the relevant authorities of the Federal Republic of Ethiopia regarding said visit; and (ii) remind those authorities of the Chamber's previous decisions regarding earlier visits, the existence of the Warrants of Arrest, and of SC Resolution 1593 (2005).⁸

7. The Chamber notes articles 21(1)(a) and (b), 87(5), 89(1), 91 and 92 of the Rome Statute (the "Statute").

8. 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

⁵ Presidency, ICC-02/05-01/09-143.

⁶ Pre-Trial Chamber II, ICC-02/05-01/09-164.

⁷ ICC-02/05-01/09-217, para. 9; ICC-02/05-01/09-217-AnxA.

⁸ ICC-02/05-01/09-217, p. 6.

impose obligations on a non-State Party.⁹ Thus, non-States Parties may decide to 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.

9. Therefore, the Federal Republic of Ethiopia, as a 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, Sudan 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).¹⁰

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

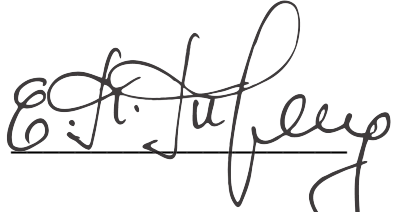
⁹ UNTS, Vol. 1155, art. 34; See also Pre-Trial Chamber I, “Decision on the request of the Defence of Abdullah Al-Senussi to make a finding of non-cooperation by the Islamic Republic of Mauritania and refer the matter to the Security Council”, 28 August 2013, ICC-01/11-01/11-420, para. 12.

¹⁰ S/RES/1593 (2005).

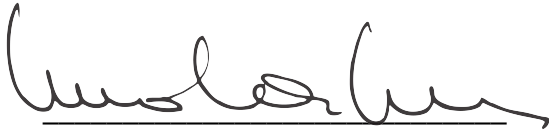
FOR THESE REASONS, THE CHAMBER HEREBY

- a) **invites** the competent authorities of the Federal Republic of Ethiopia to arrest Omar Hassan Ahmad Al-Bashir immediately and to surrender him to the Court;
- b) **orders** the Registrar to send a Note Verbale to the Federal Republic of Ethiopia:
 - (i) reminding the Ethiopian authorities of the request for the arrest and surrender of Omar Hassan Ahmad Al-Bashir transmitted to said authorities following the 10 October 2013 Decision enquiring about the visit of Omar Hassan Ahmad Al-Bashir; and
 - (ii) reminding the Federal Republic of Ethiopia of SC Resolution 1593(2005) and inviting said State once more to cooperate with the Court in his arrest and surrender to the Court;
- c) **orders** the Registrar to notify the present decision, to the competent authorities of the Federal Republic of Ethiopia; and
- d) **orders** the Registrar to prepare a report to be filed with the Chamber in due course concerning said visit.

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

A handwritten signature in black ink, appearing to read 'E. Trendafilova', written over a horizontal line.

Judge Ekaterina Trendafilova
Presiding Judge

A handwritten signature in black ink, appearing to read 'C. Tarfusser', written over a horizontal line.

Judge Cuno Tarfusser

A handwritten signature in black ink, appearing to read 'Christine Van Den Wyngaert', written over a horizontal line.

Judge Christine Van Den Wyngaert

Dated this Monday, 8 December 2014

At The Hague, The Netherlands